TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 280.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR AND PETITIONER,

vs.

YORK & WHITNEY COMPANY.

No. 281.

YORK & WHITNEY COMPANY, PLAINTIFF IN ERROR AND PETITIONER,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

IN ERROR AND ON WRITS OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

RECORDS ON WRITS OF ERROR FILED MARCH 18, 1899.

WRITS OF CERTIORARI GRANTED APRIL 26, 1900.

(27,557)

(27,557)

(27,558)

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& Detweiler (Inc.) Printers Washington D. C. November 8 1920

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1 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY

vs.

YORK & WHITNEY COMPANY.

Report.

This is an action of contract brought by the Railroad Company to recover a balance of freight and refrigeration charges on various interstate shipments of produce consigned to the defendant at Boston, Massachusetts.

The writ was dated May 16, 1914, and was returnable to the Suffolk Superior Court the first Monday of June, 1914. The ad damnum in the writ was one thousand dollars ($1,000). Copies of the plaintiff's declaration, the defendant's answer and the defendant's motion to amend its answer are annexed and made a part of this report.

The case was tried before a jury on an Agreed Statement of Facts, a copy of which is annexed and made a part of this report. The defendant also introduced in evidence the original freight bills, copies of which are attached to the Agreed Statement of Facts. There was no further evidence offered by either side.

After the parties had rested the defendant duly moved that a verdict be entered for the defendant generally and also upon each item separately as set forth in an account annexed to the plaintiff's declaration. The plaintiff also duly moved that a verdict be ordered for the plaintiff for the full sum claimed in the declaration. I refused to make at that time any rulings upon these motions and stated to counsel that I desired to have the jury pass upon certain issue before making any rulings. Both parties duly excepted. Thereupon I framed and submitted to the jury on all the evidence thirty questions.

These questions, together with the answers thereto of the jury, were as follows:

"1. Did or did not the defendant receive the letter from Van Ummersen, general freight agent, dated September 14, 1911?

"Ans. Yes.

2 "2. If the jury answer interrogatory 1 'yes,' on what day was the same received by the defendant?

"Ans. September 15.

"3. Was or was not the plaintiff notified by the defendant before delivery to the defendant of any of the six carloads of cantaloupe that the defendant was not the owner of said six carloads, but was merely

receiving them in its capacity as commission merchant and as agent for the shipper?

"Ans. Yes.

"4. Did or did not the defendant accept the first carload of cantaloupe understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?

"Ans. No.

"5. Did or did not the defendant accept the second carload of cantaloupe understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?

"Ans. Yes.

"6. Did or did not the defendant accept the third carload of cantaloupe understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?

"Ans. Yes.

"7. Did or did not the defendant accept the fourth carload of cantaloupe understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?

"Ans. Yes.

"8. Did or did not the defendant accept the fifth carload of cantaloupe understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?

"Ans. Yes.

"9. Did or did not the defendant accept the sixth carload of cantaloupe understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?

"Ans. Yes.

"10. Did or did not the defendant accept the carload of pie plant understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?

"Ans. Yes.

"11. Did or did not the defendant accept the carload of peaches described in the eighth item of the account annexed to the declaration understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?

"Ans. Yes.

3 "12. Did or did not the defendant accept the carload of peaches described in the ninth item of the account annexed to the declaration understanding that the plaintiff looked to the defendant for the payment of all freight and other lawful transportation charges thereon?

"Ans. Yes.

"13. Did or did not the defendant impliedly agree with the plain-

tiff to pay the balance of freight and transportation charges, as set forth in the first item of the account annexed to the declaration?

"Ans. No.

"14. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of freight and transportation charges, as set forth in the second item of the account annexed to the declaration?

"Ans. Yes.

"15. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of freight and tran-portation charges, as set forth in the third item of the account annexed to the declaration?

"Ans. Yes.

"16. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of freight and transportation charges, as set forth in the fourth item of the account annexed to the declaration?

"Ans. Yes.

"17. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of freight and transportation charges, as set forth in the fifth item of the account annexed to the declaration?

"Ans. Yes.

"18. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of freight and transportation charges, as set forth in the sixth item of the account annexed to the declaration?

"Ans. Yes.

"19. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of icing charges, as set forth in the seventh item of the account annexed to the declaration?

"Ans. Yes.

"20. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of icing charges, as set forth in the eighth item of the account annexed to the declaration?

"Ans. Yes.

"21. Did or did not the defendant impliedly agree with the plaintiff to pay the balance of icing charges, as set forth in the ninth item of the account annexed to the declaration?

"Ans. Yes.

"22. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the first item of the account annexed to its declaration?

"Ans. Yes.

"23. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the second item of the account annexed to its declaration?

"Ans. No.

"24. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the third item of the account annexed to its declaration?

"Ans. No.

"25. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the fourth item of the account annexed to its declaration?

"Ans. No.

"26. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the fifth item of the account annexed to its declaration?

"Ans. No.

"27. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the sixth item of the account annexed to its declaration?

"Ans. No.

"28. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the seventh item of the account annexed to its declaration?

"Ans. No.

"29. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the eighth item of the account annexed to its declaration?

"Ans. No.

"30. Is or is not the plaintiff estopped from maintaining its claim against the defendant as set out in the ninth item of the account annexed to its declaration?

"Ans. No.

Both parties duly excepted to my rulings that there were issues of fact to be submitted to the jury, but no question was raised and no objection made to the form of the questions so submitted.

5 Both parties in open court waived the submission of any further questions of fact to the jury and agreed if there were any such further questions of fact that the same might be determined by the Court. After the answers of the jury had been received the plaintiff duly moved that a verdict be ordered for the plaintiff generally and also upon each item separately as set forth in the account annexed to the plaintiff's declaration. The defendant also renewed its motion that a verdict be ordered for the defendant generally and also upon each item separately as set forth in the account annexed to the plaintiff's declaration.

The plaintiff also duly requested, among others, the following rulings and instructions:

"1. On all the evidence the plaintiff is entitled to recover six hundred and fifty-two dollars and thirty-six cents ($652.36), according to the account annexed to its declaration, with interest on the first six items in the account from October 15, 1911, with interest on the seventh item from May 21, 1912, and with interest on the eigth and ninth items from September 20, 1912."

This I refused.

"5. The defendant promised by implication to pay the full charges, according to the account annexed, based on the rates lawfully established under the Interstate Commerce Act."

This I refused.

"6. The tariff rates were the only rates which the plaintiff could lawfully receive and the plaintiff was bound to exact, and the defendant bound to pay, the lawful charges based on the tariff rates."

This I refused.

"10. The defendant was charged with knowledge of the condition

respecting the payment of freight and other charges, contained in the bills of lading covering the several shipments of produce."

As to this, I stated to the jury that I presumed it was true, but that I did not see how it applied.

"11. It is immaterial that the defendant did not actually know that bills of lading were issued and did not actually have possession of them."

This I gave as an instruction to the jury.

"16. The defendant by accepting delivery of the several shipments of produce under the bills of lading contracted by implication to pay the freight and all other lawful charges which accrued on said property."

This I refused.

"17. The defendant, as consignee, under the bills of lading covering the produce involved in this suit became bound to pay the freight and all other lawful charges accruing on said produce, according to the published schedules of rates in force and applicable."

This I refused.

6 "21. The plaintiff is not estopped to collect the undercharges appearing in the first item of the account annexed."

This I refused as an instruction, but gave as a ruling.

"22. The plaintiff is not estopped to collect the undercharges appearing in the second, third, fourth, fifth and sixth items of the account annexed."

This I refused as an instruction, but gave as a ruling.

"23. The plaintiff is not estopped to collect the undercharges appearing in the seventh, eighth and ninth items of the account annexed."

This I refused as an instruction, but gave as a ruling.

The defendant duly requested the following rulings and instructions:

1. Upon all the evidence the plaintiff is not entitled to recover.

2. Upon all the evidence the plaintiff is not entitled to recover under the first item in the account annexed to its declaration.

3. Upon all the evidence the plaintiff is not entitled to recover under the second item in the account annexed to its declaration.

4. Upon all the evidence the plaintiff is not entitled to recover under the third item in the account annexed to its declaration.

5. Upon all the evidence the plaintiff is not entitled to recover under the fourth item in the account annexed to its declaration.

6. Upon all the evidence the plaintiff is not entitled to recover under the fifth item in the account annexed to its declaration.

7. Upon all the evidence the plaintiff is not entitled to recover under the sixth item in the account annexed to its declaration.

8. Upon all the evidence the plaintiff is not entitled to recover under the seventh item in the account annexed to its declaration.

9. Upon all the evidence the plaintiff is not entitled to recover under the eighth item in the account annexed to its declaration.

10. Upon all the evidence the plaintiff is not entitled to recover under the ninth item in the account annexed to its declaration.

11. Upon all the agreed facts the plaintiff is not entitled to recover.

12. Upon all the agreed facts the plaintiff is not entitled to recover under the said first item in the account annexed to its declaration.

13. Upon all the agreed facts the plaintiff is not entitled to recover under the said second item in the account annexed to its declaration.

14. Upon all the agreed facts the plaintiff is not entitled to recover under the said third item in the account annexed to its declaration.

15. Upon all the agreed facts the plaintiff is not entitled to recover under the said fourth item in the account annexed to its declaration.

16. Upon all the agreed facts the plaintiff is not entitled to recover under the said fifth item in the account annexed to its declaration.

7 17. Upon all the agreed facts the plaintiff is not entitled to recover under the said sixth item in the account annexed to its declaration.

18. Upon all the agreed facts the plaintiff is not entitled to recover under the said seventh item in the account annexed to its declaration.

19. Upon all the agreed facts the plaintiff is not entitled to recover under the said eighth item in the account annexed to it declaration.

20. Upon all the agreed facts the plaintiff is not entitled to recover under the said ninth item in the account annexed to its declaration.

21. The defendant was a commission merchant in each transaction declared upon and as such is not liable in this action.

22. Failure to collect the lawful rates in each instance in this case was through a mutual mistake of fact.

23. Failure to collect the lawful rates in each case from the defendant here *does* not constitute a rebate under Interstate Commerce Acts, so-called (Acts of Congress approved February 4, 1887, 24 Stat. 379, Chapter 104 with Amendments).

24. The shipper in each case was bound to pay the lawful rate in full.

25. By delivering the merchandise in question to the defendant the plaintiff waived its lien for freight charges thereon.

26. There was no agreement, express or implied, between the plaintiff and the defendant whereby the defendant became liable to pay the freight and charges set forth in said first item.

27. There was no agreement, express or implied, between the plaintiff and the defendant whereby the defendant became liable to pay the freight and charges set forth in said second item.

28. There was no agreement, express or implied, between the plaintiff and the defendant whereby the defendant became liable to pay the freight and charges set forth in said third item.

29. There was no agreement, express or implied between the plaintiff and the defendant whereby the defendant became liable to pay the freight and charges set forth in said fourth item.

30. There was no agreement, express or implied, between the plaintiff and the defendant whereby the defendant became liable to pay the freight and charges set forth in said fifth item.

31. There was no agreement, express or implied, between the plaintiff and the defendant whereby the defendant became liable to pay the freight and charges set forth in said sixth item.

32. There was no agreement, express or implied, between the plaintiff and the defendant whereby the defendant became liable to pay the freight and charges set forth in said seventh item.

33. There was no agreement, express or implied, between the plaintiff and the defendant whereby the defendant became liable to pay the freight and charges set forth in said eighth item.

34. There was no agreement, express or implied, between the plaintiff and the defendant whereby the defendant became liable to pay the freight and charges set forth in said ninth item.

35. As between the plaintiff and the defendant, in each instance, the only right the plaintiff had was a lien upon the merchandise in question to satisfy transportation and other like charges.

36. The defendant as commission merchant acted as agent for the shipper and cannot be held liable for the freight and other charges set forth in said first item.

37. The defendant as commission merchant acted as agent for the shipper and cannot be held liable for the freight and other charges set forth in said second item.

38. The defendant as commission merchant acted as agent for the shipper and cannot be held liable for the freight and other charges set forth in said third item.

39. The defendant as commission merchant acted as agent for the shipper and cannot be held liable for the freight and other charges set forth in said fourth item.

40. The defendant as commission merchant acted as agent for the shipper and cannot be held liable for the freight and other charges set forth in said fifth item.

41. The defendant as commission merchant acted as agent for the shipper and cannot be held liable for the freight and other charges set forth in said sixth item.

42. The defendant as commission merchant acted as agent for the shipper and cannot be held liable for the freight and other charges set forth in said seventh item.

43. The defendant as commission merchant acted as agent for the shipper and cannot be held liable for the freight and other charges set forth in said eighth item.

44. The defendant as commission merchant acted as agent for the shipper and cannot be held liable for the freight and other charges set forth in said ninth item.

45. The mere acceptance and removal of the merchandise in each instance by the defendant as commission merchant did not create an obligation by it to pay the charges claimed.

46. The mere acceptance and removal of the merchandise in each instance by the defendant as commission merchant did not create an obligation by it to pay any charges not actually advised to it by the plaintiff at the time.

47. The mere acceptance and removal of the merchandise referred to in said first item by the defendant as commission merchant did not create an obligation by it to pay all charges in connection with transportation of the said goods by the plaintiff and other carriers.

48. The mere acceptance and removal of the merchandise referred

to in said second item by the defendant as commission merchant did not create an obligation by it to pay all charges in connection with transportation of the said goods by the plaintiff and other carriers.

49. The mere acceptance and removal of the merchandise referred to in said third item by the defendant as commission merchant did not create an obligation by it to pay all charges in connection with transportation of the said goods by the plaintiff and other carriers.

50. The mere acceptance and removal of the merchandise referred to in said fourth item by the defendant as commission merchant did not create an obligation by it to pay all charges in connection with transportation of the said goods by the plaintiff and other carriers.

51. The mere acceptance and removal of the merchandise referred to in said fifth item by the defendant as commission merchant did not create an obligation by it to pay all charges in connection with transportation of the said goods by the plaintiff and other carriers.

52. The mere acceptance and removal of the merchandise referred to in said sixth item by the defendant as commission merchant did not create an obligation by it to pay all charges in connection with transportation of the said goods by the plaintiff and other carriers.

53. The mere acceptance and removal of the merchandise referred to in said seventh item by the defendant as commission merchant did not create an obligation by it to pay all charges in connection with transportation of the said goods by the plaintiff and other carriers.

54. The mere acceptance and removal of the merchandise referred to in said eighth item by the defendant as commission merchant did not create an obligation by it to pay all charges in connection with transportation of the said goods by the plaintiff and other carriers.

55. The mere acceptance and removal of the merchandise referred to in said ninth item by the defendant as commission merchant did not create an obligation by it to pay all charges in connection with transportation of the said goods by the plaintiff and other carriers.

56. If the plaintiff is entitled to recover anything under said first item then the defendant is entitled to recoup against the plaintiff the full amount of the plaintiff's damages as found.

57. If the plaintiff is entitled to recover anything under said second item then the defendant is entitled to recoup against the plaintiff the full amount of the plaintiff's damages as found.

58. If the plaintiff is entitled to recover anything under said third item then the defendant is entitled to recoup against the plaintiff the full amount of the plaintiff's damages as found.

59. If the plaintiff is entitled to recover anything under said fourth item then the defendant is entitled to recoup against the plaintiff the full amount of the plaintiff's damages as found.

60. If the plaintiff is entitled to recover anything under said fifth item then the defendant is entitled to recoup against the plaintiff the full amount of the plaintiff's damages as found.

61. If the plaintiff is entitled to recover anything under said sixth item then the defendant is entitled to recoup against the plaintiff the full amount of the plaintiff's damages as found.

62. If the plaintiff is entitled to recover anything under said

seventh item then the defendant is entitled to recoup against the plaintiff the full amount of the plaintiff's damages as found.

63. If the plaintiff is entitled to recover anything under said eighth item then the defendant is entitled to recoup against the plaintiff the full amount of the plaintiff's damages as found.

64. If the plaintiff is entitled to recover anything under said ninth item then the defendant is entitled to recoup against the plaintiff the full amount of the plaintiff's damages as found.

65. The plaintiff is estopped from maintaining the cause of action as set forth in said first item.

66. The plaintiff is estopped from maintaining the cause of action as set forth in said second item.

67. The plaintiff is estopped from maintaining the cause of action as set forth in said third item.

68. The plaintiff is estopped from maintaining the cause of action as set forth in said fourth item.

69. The plaintiff is estopped from maintaining the cause of action as set forth in said fifth item.

70. The plaintiff is estopped from maintaining the cause of action as set forth in said sixth item.

71. The plaintiff is estopped from maintaining the cause of action as set forth in said seventh item.

11 72. The plaintiff is estopped from maintaining the cause of action as set forth in said eighth item.

73. The plaintiff is estopped from maintaining the cause of action as set forth in said ninth item.

74. Nothing in the Interstate Commerce Act, so-called, and the published tariffs governing shipments of freight, set forth in the said first item, requires, under all the facts of the case, the entry of judgment for the plaintiff for the amount set forth in said item.

75. Nothing in the Interstate Commerce Act, so-called, and the published tariffs governing shipments of freight, set forth in the said second item, requires, under all the facts of the case, the entry of judgment for the plaintiff for the amount set forth in said item.

76. Nothing in the Interstate Commerce Act, so-called, and the published tariffs governing shipments of freight, set forth in the said third item, requires, under all the facts of the case, the entry of judgment for the plaintiff for the amount set forth in said item.

77. Nothing in the Interstate Commerce Act, so-called, and the published tariffs governing shipments of freight, set forth in the said fourth item, requires, under all the facts of the case, the entry of judgment for the plaintiff for the amount set forth in said item.

78. Nothing in the Interstate Commerce Act, so-called, and the published tariffs governing shipments of freight, set forth in the said fifth item, requires, under all the facts of the case, the entry of judgment for the plaintiff for the amount set forth in said item.

79. Nothing in the Interstate Commerce Act, so-called, and the published tariffs governing shipments of freight, set forth in the said sixth item, requires, under all the facts of the case, the entry of judgment for the plaintiff for the amount set forth in said item.

80. Nothing in the Interstate Commerce Act, so-called, and the

published tariffs governing shipments of freight, set forth in the said seventh item, requires, under all the facts of the case, the entry of judgment for the plaintiff for the amount set forth in said item.

81. Nothing in the Interstate Commerce Act, so-called, and the published tariffs governing shipments of freight, set forth in the said eighth item, requires, under all the facts of the case, the entry of judgment for the plaintiff for the amount set forth in said item.

82. Nothing in the Interstate Commerce Act, so-called, and the published tariffs governing shipments of freight, set forth in the said ninth item, requires, under all the facts of the case, the entry of judgment for the plaintiff for the amount set forth in said item.

12 83. There is nothing in the Interstate Commerce Act, so-called, and the published tariffs governing the several shipments of freight set forth in the plaintiff's declaration, which prevents the plaintiff from delivering the merchandise in question to the defendant without any payment whatever, upon all the facts in this case.

84. There is nothing in the Interstate Commerce Act, so-called and the published tariffs governing the several shipments of freight set forth in the plaintiff's declaration, which prevents the plaintiff from delivering said freight to the defendant upon the payment of a sum less than the regular scheduled rate for freight and other charges, as set forth in said published tariff governing said shipments.

85. Said Interstate Commerce Act, so-called, is satisfied as long as either the shipper or the owner of the freight in question were liable to pay the lawful rates, as per the published tariffs governing said shipments.

86. There is nothing in the Interstate Commerce Act, so-called, which prevents the application of the doctrine of estoppel as a defense to the causes of action set forth in the declaration or any of them.

87. There is nothing in the Interstate Commerce Act, so-called, which prevents the application of recoupment as a defense to the causes of action set forth in the declaration or any of them.

88. Payments made by the defendant to the plaintiff of the bills for freight and other charges, as rendered and the return by the plaintiff to the defendant of said receipted bills, constituted a release to the defendant of all further claims for freight and other charges of said shipments.

89. Payments made by the defendant to the plaintiff of the bills for freight and other charges, as rendered and the return by the plaintiff to the defendant of said receipted bills, constituted accord and satisfaction of all claims of the plaintiff against the defendant growing out of said shipments.

I gave the 22d, 24th, 25th, 47th to 55th, both inclusive, and the 74th to the 82d, both inclusive. I refused the 35th request as made and gave it as follows:

"35. As between the plaintiff and the defendant in each instance, the only right the plaintiff originally had was a lien upon the merchandise in question to satisfy transportation and other like charges."

I refused all the others.

After the answers of the jury had been received the defendant duly filed a motion "that the answers of the jury to the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth and thirtieth issues be set aside and that said issues be discharged for the following reasons:

13 1. Because said answers are contrary to the facts to which the plaintiff agreed and there are no such issues of fact in dispute.

2. Because said answers are contrary to the evidence and the weight of the evidence.

3. Because said answers are contrary to law.

4. Because said answers are contrary to the instructions given by the Court.

5. Because said answers are all inconsistent with the answers to other issues and especially the answers to the third, fourth, thirteenth and twenty-second issues.

After hearing counsel I denied the motion. Thereafter, I ruled that the plainiff could not recover on the first item in the account annexed to its declaration, but I ordered a verdict for the plaintiff on the remaining eight items amounting to five hundred and forty-three 87/100 (543.87) dollars principal and one hundred seventy-five and 13/100 (175.13) dollars interest, making a total of seven hundred nineteen (719) dollars.

Whereupon, under my direction, the jury returned a verdict for the plaintiff in the sum of seven hundred nineteen (719) dollars.

The plaintiff duly excepted to the refusal as aforesaid to grant the motion and give the rulings and instructions requested by it and to the rulings and instructions given as aforesaid, in so far as inconsistent with the rulings and instructions requested by it; and the defendant duly excepted to the refusal as aforesaid to grant the motion and give the rulings and instructions requested by it and to the rulings and instructions given as aforesaid, in so far as inconsistent with the rulings and instructions requested by it.

The rights of both parties on all questions were duly saved.

After the return of the verdict as aforesaid as directed and before the recording thereof, I reserved leave, with the consent of the jury, to enter a different verdict if, upon the exceptions taken or the questions of law reserved, this court or the Supreme Judicial Court should decide that such different verdict should have been entered. Thereupon by the agreement of both parties I hereby report all questions of law raised upon this record for the determination of the Supreme Judicial Court for the Commonwealth. If my rulings were correct judgment is to be entered for the plaintiff on the verdict, but if my

rulings in whole or in part were wrong such judgment shall be entered or order made as ought to have been made by me.

CHARLES U. BELL,
Justice of the Superior Court.

Filed June 30, 1917.

14 *Plaintiff's Declaration.*

And the plaintiff says that the defendant owes it the sum of six hundred and fifty-two dollars and thirty-six cents ($652.36) for freight and icing charges, according to the account hereto annexed, with interest thereon from the dates when various items became due and payable and payment was refused.

By Its Attorney, GEO. H. FERNALD, Jr.

Filed June 1, 1914.

Account Annexed.

Item No. 1.				
Aug. 31, 1911.	Car canteloupes P. F. E. 8877, Payette, Idaho, to Boston, Mass.—			
	Freight Payette, Idaho to Chicago, Ill., 20,945 lbs. *@* 75c.		$157.09	
	Freight, Chicago to Boston, 24,000 lbs. minimum weight *@* 39c.		93.60	
	Refrigeration Payette to Boston		80.00	
			330.69	
	Paid on account		222.20	
	Balance due			$108.49
2. Sept. 1, 1911.	Car canteloupes P. F. E. 4781 Payette, Idaho to Boston, Mass.—			
	Freight Payette to Chicago, Ill., 21,260 lbs. *@* 75c.		159.45	
	Freight Chicago, Ill., to Boston 24,000 lbs. minimum weight *@* 39c.		93.60	
	Refrigeration Payette to Boston		80.00	
			333.05	
	Paid on account		224.45	
	Balance due			108.60

3. Sept.	2, 1911.	Car canteloupes P. F. E. 1324 Payette, Idaho to Boston, Mass.—		
		Freight Payette, Idaho to Chicago, Ill., 20,695 lbs. @ 75c.	155.21	
		Freight Chicago, Ill., to Boston, 24,000 lbs. minimum weight @ 39c.	93.60	
		Refrigeration Payette to Boston	80.00	
			328.81	
		Paid on account	220.21	
15		Balance due		108.60
4. Sept.	4, 1911.	Car canteloupes P. F. E. 9448 Payette, Idaho to Boston, Mass.—		
		Freight Payette to Chicago, Ill., 20,775 lbs. @ 75c.	155.81	
		Freight Chicago to Boston, 34,000 lbs. minimum weight @ 39c.	93.60	
		Refrigeration Payette to Boston	80.00	
		Detention at Payette	5.00	
			334.41	
		Paid on account	225.81	
		Balance due		108.60
5. Sept.	5, 1911.	Car canteloupes P. F. E. 7701 Payette, Idaho to Boston, Mass.—		
		Freight Payette to Chicago, 20,915 lbs. @ 75c.	156.86	
		Freight Chicago to Boston, 34,000 lbs. minimum weight @ 39c.	93.60	
		Refrigeration Payette to Boston	80.00	
		Detention at Payette	5.00	
			335.46	
		Paid on account	227.40	
		Balance due		108.06

6. Sept. 11, 1911.	Car canteloupes P. F. E. 1963 Payette, Idaho to Boston, Mass.—			
	Freight Payette to Chicago, 20,335 lbs. *@* 75c.	152.51		
	Freight Chicago to Boston, 24,000 lbs. *@* 39c.	93.60		
	Refrigeration Payette to Boston	80.00		
	Detention at Payette	5.00		
		331.11		
	Paid on account	232.35		
	Balance due			$98.7
7. April 28, 1912.	Icing car F. G. E. 18,787 containing pie plant Chicago to Boston—			
16	1,000 lbs. ice at Karners, N. Y., *@* $2.50 per ton			1.2
8. Sept. 12, 1912.	Icing car M. D. T. 18,029 containing peaches, Hamlin, N. Y., to Boston—			
	2 tons of ice at Charlotte, N. Y., *@* $2.50 per ton			5.0
9. Sept. 13, 1912.	Icing car M. D. T. 11,788 containing peaches, Hamlin, N. Y., to Boston—			
	2 tons of ice at Charlotte, N. Y., *@* $2.50 per ton			5.0
				$652.3

Defendant's Answer.

And now comes the defendant in the above entitled action and f answer denies each and every allegation in the plaintiff's writ a declaration contained.

And further answering the defendant says that if it ever owed t plaintiff anything as alleged it has paid the same and now owes t plaintiff nothing.

By Its Attorneys, ADAMS & BLINN.

Filed June 29, 1914.

Defendant's Motion to Amend Its Answer.

And now comes the defendant in the above entitled action a moves to amend its answer by adding thereto the following par graphs:

3. And further answering the defendant says that it has paid the plaintiff the sum of two hundred twenty-two and 20/100 (222.20) dollars in full settlement of the freight and other charges on the shipment of one car of cantaloupes as set forth in the first item of the account annexed to the plaintiff's declaration, and that the plaintiff received the same in full accord and satisfaction therefor as against the defendant and the defendant now owes the plaintiff nothing therefor.

4. And further answering the defendant says that it has paid the plaintiff the sum of two hundred twenty-four and 45/100 (224.45) dollars in full settlement of the freight and other charges on the shipment of one car of cantaloupes as set forth in the second item of the account annexed to the plaintiff's declaration, and that the plaintiff received the same in full accord and satisfaction therefor as against the defendant, and the defendant now owes the plaintiff nothing therefor.

5. And further answering the defendant says that it has paid the plaintiff the sum of two hundred twenty and 21/100 (220.21) dollars in full settlement of the freight and other charges on the shipment of one car of cantaloupes as set forth in the third item of the account annexed to the plaintiff's declaration, and that the plaintiff received the same in full accord and satisfaction therefor as against the defendant, and the defendant now owes the plaintiff nothing therefor.

6. And further answering the defendant says that it has paid the plaintiff the sum of two hundred twenty-five and 81/100 (225.81) dollars in full settlement of the freight and other charges on the shipment of one car of cantaloupes as set forth in the fourth item of the account annexed to the plaintiff's declaration, and that the plaintiff received the same in full accord and satisfaction therefor as against the defendant and the defendant now owes the plaintiff nothing therefor.

7. And further answering the defendant says that it has paid the plaintiff the sum of two hundred twenty-seven and 40/100 (227.40) dollars in full settlement of the freight and other charges on the shipment of one car of cantaloupes as set forth in the fifth item of the account annexed to the plaintiff's declaration, and the plaintiff received the same in full accord and satisfaction therefor as against the defendant, and the defendant now owes the plaintiff nothing therefor.

8. And further answering the defendant says that it has paid the plaintiff the sum of two hundred thirty-two and 35/100 (232.35) dollars in full settlement of the freight and other charges on the shipment of one car of cantaloupes as set forth in the sixth item of the account annexed to the plaintiff's declaration, and the plaintiff received the same in full accord and satisfaction therefor as against the defendant and the defendant now owes the plaintiff nothing therefor.

9. And further answering the defendant says that it has paid the plaintiff the sum of sixteen and 50/100 (16.50) dollars in full settlement of the icing and refrigeration charges on the shipment of one car of pie plant as set forth in the seventh item of the account annexed to the plaintiff's declaration, and the plaintiff received the same in full accord and satisfaction therefor as against the defendant, and the defendant now owes the plaintiff nothing therefor.

10. And further answering the defendant says it has paid the plaintiff the sum of seventeen and 50/100 (17.50) dollars in full settlement of the icing and refrigeration charges on the shipment of one car of peaches, as set forth in the eighth item of the account annexed to the plaintiff's declaration, and the plaintiff received the same in full accord and satisfaction therefor as against the defendant, and the defendant now owes the plaintiff nothing therefor.

11. And further answering the defendant says that it has paid the plaintiff the sum of eleven and 88/100 (11.88) dollars in
18 full settlement of the icing and refrigeration charges on the shipment of one car of peaches, as set forth in the ninth item of the account annexed to the plaintiff's declaration, and the plaintiff received the same in full accord and satisfaction therefor as against the defendant, and the defendant now owes the plaintiff nothing therefor.

12. And further answering the defendant says that the plaintiff has executed and delivered to it a receipt and discharge in full for the freight, icing and refrigeration charges declared on, and has discharged the plaintiff therefrom and from the causes of action set out in the declaration.

13. And further answering the defendant says that it is a Commission Merchant with places of business at 1 North Market and 24, 26 and 28 Commercial Streets, in Boston, in said county, in the center of the market district, selling on commission all kinds of produce, especially fruit and vegetables; that it has existed for many years and is widely known throughout the country as such Commission Merchant, that produce dealers throughout the country consign and ship to it produce for sale on commission at the market prices and it receives such consignments from persons entirely unknown to it in the usual course of business; that the nature of its business and the produce so consigned require the same be disposed of immediately at the market prices; that it is in no way interested in such goods, but simply acts as a commission merchant for the sole purpose of selling same for the shipper, for which it receives a commission on the amount obtained therefor; that in the later part of August and the early part of September, 1911, the Payette Valley Melon Growers' Association shipped from Payette, Idaho, six cars of cataloupes, being respectively the six cars referred to in the first six items of the account annexed to the plaintiff's declaration under non-negotiable bills of lading; one such car was consigned to this defendant and the other five cars to one O. E. Spooner, all way billed to Chicago, Illinois, and declaration thereafter was

changed to Boston, Mass., and the consignee of the other five cars changed from said Spooner to this defendant; that the defendant had never before had any dealings with the said shipper and the first information it had for the transaction was the arrival of the first car; that the first car arrived in Boston on September 11, 1911, and before deciding whether to accept the same, as the cantaloupe market was weak, and the produce was running poor, it informed the plaintiff that it expected six cars of cantaloupes which had been consigned to it from Payette, Idaho, and that the first car had arrived and inquired what the freight and other charges on such shipment from Payette, Idaho, to said Boston would be; that the defendant caused an inquiry to be made and thereafter on the same day the plaintiff informed the defendant that the freight and other charges on the said first car which had arrived were two hundred twenty-two and 20/100 (220.20) dollars and the plaintiff issued the defendant a freight bill therefor which the defendant paid before
19 the contents of said car were turned over to the defendant; that the defendant thereupon sold the contents of said car and on September 13, 1911, it remitted to the consignor ninety-five (95) dollars, being the net balance of the proceeds of said contents, after freight and other transportation charges and its commission thereon had been deducted; that thereafter the other five cars arrived and before the delivery to the defendant of the contents of each car, the plaintiff rendered the defendant a freight bill for each based upon the same rate as was the bill on the said first car, and the defendant paid the same in each case before receiving the contents; that the contents of said five cars were sold by the defendant as commission merchant, as aforesaid, and there was a net loss to the defendant upon the five cars taken together, and no further remittances were made to the shipper, but that the shipper owed and still owes a balance due for freight and other transportation and commission charges thereon; that on or about October 15, 1911, the plaintiff informed the defendant that there had been an error made in the rate charged on the contents of said six cars; that there was a balance due for such charges, substantially, as set forth in said first six items; that the defendant thereupon informed the plaintiff of the facts hereinbefore set forth; that it had in its hands no funds of the shipper to adjust said charges and referred the plaintiff to the shipper; that if the defendant is required to pay the sum sought to be recovered in said first six items it will result in a loss to it of that amount; that if the plaintiff made a mistake in its charges on the contents of said six cars, as contended by it, the same was made through its own carelessness and negligence and that of its servants and agents and that it is a common carrier of freight and very familiar with all freight rates and schedules, while the defendant was entirely ignorant with reference thereto, and was especially ignorant as to the rate on said cantaloupes; that the schedules and rates governing said shipment in interstate commerce were voluminous, complicated and difficult to understand, and it is difficult to any one not familiar with them to ascertain the proper freight rates, and that there was no through rate from Payette to said Boston, and

that this was the first shipment of cantaloupes between said points, in so far as known; that the plaintiff and its officers and agents were and are experts with reference to these matters, which fact was known to the defendant; that the defendant was not upon the credit list of the plaintiff and had especially declined to sign an agreement to accept all freight consigned to it in consideration of being placed upon such credit list; that for many years it had received produce on commission from the plaintiff and the Boston & Albany Railroad, its predecessor, in conducting a freight terminal business in said Boston and had paid the freight upon each consignment before or on the day of the delivery and in all cases where an error in rendering freight bills had been discovered on such commission transactions after the defendant had settled with the shipper, these facts were explained to the plaintiff and said Boston & Albany Railroad and no further claims were made upon the defendant and no suit had ever been brought against the defendant therefor prior to the case at bar; that it will be unjust and inequitable to allow the plaintiff to take advantage of its own carelessness and negligence at the expense and great damage of the defendant, and the plaintiff is now estopped from so doing, and maintaining this action and if the plaintiff has stated good causes of action against the defendant, with reference to the said first six items, then the defendant has good cause of action against the plaintiff, growing out of the carelessness and negligence of the plaintiff, as aforesaid; that it will be unjust and inequitable to allow the plaintiff to maintain this action and the defendant makes the above allegations for answer as equitable defences and to avoid circuity of action.

14. And further answering, with reference to the allegations contained in the seventh, eighth and ninth items of the account annexed to the plaintiff's declaration, the defendant says, in addition to the things hereinbefore set forth, that the plaintiff received the consignments of pie plant and peaches, as set forth in said items, as commission merchant, with no interest therein, except to sell the same for the shippers; that the plaintiff rendered the defendant a bill for freight and other charges on each said shipments, and the defendant paid the same and the plaintiff receipted the bill and returned it to the defendant on the same day upon which the consignment was delivered to the defendant; that said bill for the charges on the car set forth in said seventh item showed that said car had been iced three times and the bills for the cars as set forth in the eighth and ninth items showed that each car had been iced twice; and the defendant had no knowledge that each car had been iced more than twice as set forth on said bills and did not suspect that such was the fact; that after the sale of the contents of each car the defendant accounted to the shipper for the proceeds, after deducting the freight, icing and other charges thereon with its commission, and since said time has had no funds of the respective shippers in its hands; that after such adjustments with the shipper in each case, the plaintiff informed the defendant of the additional icing charges sought to be recovered in said three items and the defendant informed the plaintiff that said shipments were commission transactions; that

it had no funds belonging to the shippers and referred the plaintiff to the shippers for collection; that if the defendant is now required to pay the plaintiff the sum sought to be recovered in said items it will result in a loss of that amount; that if the plaintiff made mistakes in rendering the defendant bills for freight and other like charges upon said three cars as contended by it, whereby it omitted charges for additional icing as set forth in said three items; the same was made through its own carelessness and negligence; that the defendant had no knowledge whatever of the facts covering the transactions and no way to ascertain the same, except from the plaintiff and that the plaintiff knew or should have known the number of times each consignment was iced; that it will be unjust and inequitable to allow the plaintiff to take advantage of its own carelessness and negligence at the expense and great
21 damage of the defendant and the plaintiff is now estopped from so doing and maintaining this action, and this is made an equitable defense as aforesaid.

15. And further answering as equitable defenses in connection with allegations of the last two paragraphs the defendant says that the plaintiff is guilty of laches in the premises and been guilty of unreasonable delay before it discovered its own errors; it permitted the defendant to account to the consignors in each case for the proceeds of the sales of the produce in question, thereby rendering it impossible for the defendant to protect it from any further charges growing out of errors; and that it was well known to the plaintiff that commission merchants, including the defendant, usually accounted and remitted to the consignors forthwith, upon each transaction, immediately.

16. And further answering, in addition to all the facts hereinbefore set forth in this answer as amended which are by reference incorporated in this paragraph to avoid repetition, the defendant further says that because of the carelessness and negligence of the plaintiff in computing freight and other charges upon the shipments as set forth in the said items in the account annexed to the plaintiff's declaration, the plaintiff has been put to great injury and damage, as is claimed, by becoming liable to pay the plaintiff the sum of six hundred fifty-two and 36/100 (652.36) dollars, together with interest thereon and the costs, expenses and attorneys' fees and loss of time sustained by the defendant, all of which this defendant seeks to recoup in this action.

By its Attorneys, ADAMS & BLINN.

Filed and allowed Feb. 27, 1917.

Agreed Statement of Facts.

For the purposes of this suit it is agreed by the parties that the following are facts; subject to the right of either party to object to the competency as evidence of any of said facts:

1. This action is to recover six hundred fifty-two dollars and thirty-six cents ($652.36), an alleged balance of freight charges. Of this sum six hundred forty-one dollars and eleven cents (641.11), as set out in the first six items of the account annexed to the plaintiff's declaration, is claimed on a shipment of six cars of cantaloupes consigned by the Payette Valley Melon Growers' Association from Payette, Idaho, to the defendant at Boston, Massachusetts.

2. Car No. 8877 P. F. E. was shipped August 31st, 1911, arriving in Boston, September 11, 1911, and containing 20,945 pounds, for which the plaintiff issued a freight bill to the defendant show-
22 ing a total of charges amounting to $222.20. This was the first car of the said lot of six cars to arrive.

3. Immediately upon receiving notice from the plaintiff of the arrival of the first car of this lot, James M. York, the President of the defendant company, instructed one Goodwin, who was clerk and director of the defendant corporation, and the person in charge of its freight business, to communicate with the plaintiff or the Boston & Albany Railroad Company to ascertain the amount of freight charges on this car. Thereupon the said Goodwin called up the office of G. B. Ager, who was the freight agent of the plaintiff corporation in charge of the plaintiff's Knowland Street freight yard at the City of Boston, and under whose direction all freight is delivered there, and all bills for freight rendered, and inquired of the person who answered the telephone what the freight charge on this shipment of cantaloupes from Payette, Idaho, to Boston was. The person replied after saying that he would look it up, that they had no bill as yet, for this shipment, and that no one in the office knew what the rate on cantaloupes between these two points was, and that as soon as a bill was received or the information obtained, they would notify the defendant immediately. The said Goodwin informed the person talking by telephone as above that these six cars which were expected were commission goods and that the defendant wished to know what the charges would be before it decided to accept the consignment.

4. Later on the same day the said Goodwin was called by telephone by some one stating that this was the B. & A. freight office, and in response to the said Goodwin's inquiry the person talking had ascertained and gave the charges upon the said car of cantaloupes as $222.20.

5. Thereafter, on the same day, the plaintiff delivered to the defendant the freight bill in question, as above set forth, and the defendant paid it the same day and the plaintiff duly receipted the bill and returned it to the defendant. A copy of said bill is hereto annexed and made a part hereof and marked Exhibit A. After paying this bill the defendant then accepted the said first car with its contents.

6. The said Goodwin does not know the name of the person or persons with whom he talked on both said occasions and he is unable to identify such person. There are a large number of persons employed by the plaintiff at said freight office; in the telephone directory of The New England Telephone & Telegraph Company for Boston, Mass., under the heading Boston & Albany Railroad, there was listed "Freight Office, Kneeland, Oxford 1029" and this was the number called by the said Goodwin since the cantaloupes were expected to arrive at this yard; freight from New York and beyond in the usual course of business generally arrives at this yard for delivery; the defendant and the said Goodwin for the defendant for twenty years, or more, have been in the habit of calling said telephone number Oxford 1029 to inquire for expected
23 consignments of freight and produce, and to inquire the rate therefor and to ask for details and other information concerning shipments which the defendant expected to receive and the questions so asked were always answered by the person or persons from time to time who answered the telephone and the defendant was in the habit of acting upon and did act upon the information so received; and consignees generally dealing in the fruit and produce business at said Boston have been in the habit for many years of calling said telephone number Oxford 1029 for like information, and acting thereon.

7. Thereafter car No. 4781 P. F. E. was shipped on September 1st, 1911, arriving in Boston on September 11th, 1911, and containing 21,260 pounds; the plaintiff rendered to the defendant a freight bill showing total charges amounting to $224.45 and this bill was paid in full September 20th, 1911. A copy of the same is hereto annexed and marked Exhibit B.

8. Thereafter car No. 1324 P. F. E. was shipped September 2d, 1911, arriving in Boston on September 12th, 1911, and containing 20,695 pounds; the plaintiff rendered to the defendant a freight bill showing total charges amounting to $220.21, and this bill was paid in full September 20th, 1911. A copy of the same is hereto annexed and marked Exhibit C.

9. Thereafter car No. 9448 P. F. E. was shipped September 4th, 1911, arriving in Boston on September 14th, 1911, and containing 20,775 pounds; the plaintiff rendered to the defendant a freight bill showing total charges amounting to $225.81, and this bill was paid in full September 23d, 1911. A copy of the same is hereto annexed and marked Exhibit D.

10. Thereafter car No. 7701 P. F. E. was shipped September 5th, 1911, arriving in Boston on September 16th, 1911, and containing 20,915 pounds; the plaintiff rendered to the defendant a freight bill showing total charges amounting to $227.40, and this bill was paid in full September 28th, 1911. A copy of the same is hereto annexed and marked Exhibit E.

11. Thereafter car No. 1963 P. F. E. was shipped September 19th, 1911, arriving in Boston on September 20th, 1911, and containing 20,335 pounds; the plaintiff rendered to the defendant a freight bill showing total charges amounting to $232.35, and this bill was paid in full September 28th, 1911. A copy of the same is hereto annexed and marked Exhibit F.

12. All said bills were receipted by the plaintiff and returned to the defendant.

13. For all of said cars the shipper ordered and the carrier furnished refrigeration with ventilators open to the first re-icing station. Said cars, P. F. E. 9448, 7701 and 1963, were not loaded at Payette until after the expiration of twenty-four hours from the time they were iced and placed for loading by the carrier. These facts were unknown to the defendant, except what is disclosed by said freight bills.

24 14. All of said six cars were covered by straight bills of lading in the form approved by the Interstate Commerce Commission and prescribed by the "Western Classification" containing the classification of freight in force and applicable to said shipments and duly published and filed with the Interstate Commerce Commission as required by law. A copy of the bill of lading covering said car, P. F. E. 1963, is hereto attached and made a part hereof and marked "Exhibit G."

16. The other five bills of lading covering the five cars were of exactly the same form, both back and front, as Exhibit G. The shipper in each case was the Payette Valley Melon Growers' Association and the consignee in these five was O. E. Spooner, destination, Boston, Mass. The route was the same; the descriptions and weight of the cantaloupes in each was the same as in the freight bill rendered for each respective car, as hereinbefore set forth. Each was signed by the shipper and the agent of the carrier, the same as Exhibit G. Each also contained provisions for ventilation and icing similar to Exhibit G. On the face of the bills of lading covering cars P. F. E. 9448 and P. F. E. 7701 were written "$5.00 detention." The rate of freight was not stated in any of the six bills of lading. The one covering car P. F. E. 8877 was dated August 31, 1911; the one covering car P. F. E. 4781 was dated September 1, 1911; the one covering car P. F. E. 1324 was dated September 2, 1911; the one covering car P. F. E. 9448 was dated September 3, 1911, and the one covering car P. F. E. 7701 was dated September 5, 1911.

16. All the original bills of lading were retained by the shipper, were never forwarded to nor came to the possession of the defendant and the defendant had no actual knowledge that any had been issued or of the terms and provisions thereof, until after this suit was brought, but the defendant knew that usually bills of lading were issued to cover shipments of freight and in the regular course of its business had seen and handled many bills of lading.

17. All six cars were originally waybilled to "Chicago" and moved to Chicago over the Oregon Short Line Railroad (the initial carrier), the Union Pacific Railroad and the Chicago & Northwestern Railroad. At the request of the shipper, the Chicago & Northwestern Railroad at Chicago made the defendant consignee of all the cars and wrote "Boston" in place of "Chicago" on the way bills. The cars then moved from Chicago over the New York Central Lines to Boston. The agent of the Chicago & Northwestern Railroad, who changed the way bills to carry the cars from Chicago to Boston, neglected to change the total charges appearing on each way bill by adding thereto the charges for the carriage and refrigeration of the freight from Chicago to Boston, so that the total charges appearing on each way bill included merely the charges accruing up to Chicago as originally made on the way bill by the initial carrier.

18. The defendant accepted all of said cars after having received and paid the freight bill for the first car as above set forth. Each car was accepted by the defendant on the day on which it received and paid the freight bill therefor.

19. On September 11, 1911, before accepting any of the said carloads of cantaloupes or paying any of the freight charges thereon, the defendant, by Franklin O. Watson, its Treasurer, wrote to the Plaintiff's Traffic Manager a letter a copy of which follows:—

"J. M. York, Prest. F. O. Watson, Vice-Prest. and Treas. Members of National League of Commission Merchants of the United States.

York & Whitney Co.,

Produce Commission Merchants,

1 North Market and
24, 26 and 28 Commercial Sts.

Telephone, Richmond No. 1. Boston, Sep. 11, 1911.

H. M. Biscoe, Frt. Traffic Mgr.,
B. & A. R. R. South Terminal, Boston.

DEAR SIR:

We are interested at this time in the current tariff rates on cantaloupes, in car lots, under refrigeration from Payette, Idaho, to Boston.

Will you kindly inform us as to this rate with tariff references, etc., giving us this information at once if possible.

Yours truly,

YORK & WHITNEY CO.,
F. O. WATSON, *Treas.*

(Stamp:) (Boston & Albany R. R., N. Y. C. & H. R. R. R. Co., Rec'd. Sep. 12, 1911. Traffic Manager.)"

19*a*. The plaintiff's officers and agents will testify that:

"This letter was referred to the plaintiff's general freight agent who at once wired the general freight agent of the Oregon Short Line Railroad to advise their tariff rate and refrigeration charges on cantaloupes from Payette to Boston and tariff authority. On receipt of this information from the general freight agent of the Oregon Short Line Railroad, the plaintiff's general freight agent, on Sep-
26 tember 14, 1911, mailed to the defendant, in the regular course of business, in time to be received September 15, 1911, a letter, a copy of which follows:

"New York Central Lines.

Boston & Albany Railroad,

(N. Y. C. & H. R. R. R. Co., Lessee)

Freight Traffic Department,

South Station.

R. Van Ummersen, General Freight Agent.

Boston, Mass., Sept. 14, 1911.

In your reply refer to File No. 29686.

Messrs. York & Whitney Co.,
1 No. Market St.,
Boston, Mass.

GENTLEMEN:

Replying to your letter of Sept. 11th:

Would advise that the present rate on cantaloupes, in carloads from Payette, Idaho, to Boston, Mass., is made up as follows:—

Present rate on cantaloupes in carloads of 20,000 lbs. minimum weight Payette, Idaho, to Chicago, 75c, per 100 lbs. Authority of Oregon Shore Line *Line* R. R. I. C. C. 1707. Present rate from Chicago to Boston on cantaloupes in carloads of 24,000 lbs. minimum weight in car not exceeding 36 ft., 6 in., in length 39c per 100 lbs authority of L. S. and M. S. ICC-A 2474. The refrigeration charge from Payette, Idaho to Boston on cantaloupes carloads is $65.00 per car, authority of O. S. L. R. R. I. C. C. No. 1748.

Yours truly,

R. VAN UMMERSEN,
General Freight Agent."

N. Copy—E. P. Gardiner.

19*b*. The said letter written by Van Ummersen to the defendant was enclosed in an envelope plainly and properly addressed to the defendant at its place of business in Boston, postage prepaid, and deposited in the United States mail at Boston. On the outside of the

envelope in the upper left hand corner there was printed in plain type the following:—

"Return in five days to
Boston & Albany Railroad
N. Y. C. & H. R. R. Co., Lessee,
General Freight Office,
South Station, Boston, Mass."

27 The letter was never returned. The plaintiff, after mailing the letter as aforesaid, never received from the defendant any request to answer the defendant's letter of September 11, 1911.

19c. The defendant's officers and agents will testify that the defendant now has no record of said letter ever having been received and that none of the officers or agents of the corporation have any memory whatever that the information therein contained was ever called to their attention and that had the defendants known of the charges which are claimed to be correct charges on said six carloads of cantaloupes it would not have received the same at all because of market conditions.

20. That the defendant at the present time has no record of the said letter written by its treasurer to Biscoe. That in 1911 copies of letters written ordinarily were not kept but the stenographers' note books were kept. That all the note books for that year were destroyed before this suit was brought, but carbon copies of letters which were deemed of importance were usually kept. That correspondence as to freight rates at that time were not deemed important and such letters as the one from Van Ummersen to the defendant were not usually preserved by the defendant in the regular course of its business.

21. The plaintiff's Traffic Manager was in charge of the Freight Department of the Railroad, and both he and the General Freight Agent were higher in authority than the Freight Agent of the plaintiff at the Kneeland Street Freight Office and persons employed in said office. The said General Freight Agents and his assistants were more conversant with the rates in force than the said Freight Agent at the Kneeland Street Freight Office.

22. Upon receipt of the first of said cars of cantaloupes (P. F. E. 8877) on September 11, 1911, the defendant forthwith proceeded to dispose of the same as commission merchant for the Payette Valley Melon Growers' Association, and sold the entire carload lot that day and collected the proceeds thereon. On September 13, 1911, it sent the said Payette Valley Melon Growers' Association a statement of its account of the disposal of said car, showing

370 crates melons		$365.85
Charges:		
Demurrage	$ 1.00	
Freight paid	222.20	
Carting	11.07	
Commission	36.58	
	$270.85	270.85
Net proceeds		$ 95.00

28 and enclosed with said statement its check to the order of said Payette Valley Melon Growers' Association for said balance of $95.00.

23. The contents of said car P. F. E. 4781 was sold within two days after its receipt, as aforesaid, and after paying the plaintiff its freight bill thereon, on September 20, 1911, it rendered the said Payette Valley Melon Growers' Association a statement of the account of sales, as follows:

381 crates melons		$234.75
Charges:		
Demurrage	$ 8.00	
Freight paid	224.45	
Carting	15.12	
Commission	23.47	
		271.04
Loss on carload lot		$36.29

The defendant thereupon charged upon its books the said sum of $36.29 to the account of the Payette Valley Melon Growers' Association.

24. The contents of said car P. F. E. 1324 was sold within two days after its receipt, as aforesaid, and after paying the plaintiff its freight thereon, on September 20, 1911, it rendered the said Payette Valley Melon Growers' Association a statement of the account of sales, as follows:

347 crates melons		$294.80
Charges:		
Demurrage	$ 4.00	
Freight paid	220.21	
Carting	14.16	
Commission	29.48	
		267.85
Net proceeds		$26.95

It thereupon credited the account of said Payette Valley Melon Growers' Association with said sum of $26.95 as part payment for the loss on the contents of the car described in the last paragraph.

24*a*. The contents of said car P. F. E. 9448 was sold within two days after its receipt, as aforesaid, and after paying the plaintiff its freight thereon it rendered to the said Payette Valley Melon Growers' Association a statement of the account of sales, as follows:

332 crates melons		$148.22
Charges:		
Demurrage	$ 5.00	
Freight	225.81	
Carting	13.50	
		244.31
Loss on carload lot		$ 96.09

29 The defendant thereupon charged upon its books the said sum of $96.09 to the account of the Payette Valley Melon Growers' Association. Nothing was included for commission in this entry.

24*b*. The contents of said car P. F. E. 7701 were sold within two days after its receipt, as aforesaid, and after paying the plaintiff its freight thereon it rendered the said Payette Valley Melon Growers' Association a statement of the account of sales, as follows:

347 crates of melons, less 58 crates shrunk at car		$203.60
Charges:		
Demurrage	$8.00	
Freight	227.40	
Carting	13.17	
Commission	20.36	
		268.93
Loss on carload lot		$65.33

The defendant thereupon charged upon its books the said sum of $65.33 to the account of the Payette Valley Melon Growers' Association.

25. The contents of said car P. F. E. 1963 were sold within two days after its receipt, as aforesaid, and after paying the plaintiff its freight thereon, it rendered the said Payette Valley Melon Growers' Association a statement of the account of sales, as follows:

347 crates of melons, less 24 crates shrunk at car		$289.15
Charges:		
Demurrage	$1.00	
Freight	232.35	
Carting, etc.	14.91	
Commission	28.91	
		277.17
Net proceeds		$11.98

The defendant thereupon retained said sum of $11.98 and applied $9.34 thereof to balance the rest of the loss on said car P. F. E. 4781, as set forth in paragraph 23 hereof, and the balance of $2.64 was applied on account of the loss of said cars numbered P. F. E. 9448 and P. F. E. 7701.

25a. The defendant has never been repaid the balance of its disbursements on said six cars nor of its commissions, although it has repeatedly demanded the same from the consignor. The consignor was an association of fruit growers without capital which ceased to do business shortly after shipping the said six carloads of cantaloupes.

26. With the exception of the above transactions of six carloads of cantaloupes, the defendant has had no dealings with the Payette Valley Melon Growers' Association, and from that time to the present time it has not had in its hands or possession any funds of the consignor.

27. On or about October 14, 1911, the plaintiff's agents, having checked up these freight bills and discovered the error, the plaintiff sent to the defendant supplementary freight bills for additional charges on the six cars in question, with a statement from the agent of the plaintiff that an error had been made in making up the bills as originally rendered, and that there were further sums due for freight and other charges, substantially as sought to be recovered in this action. Thereupon the defendant returned said supplementary bills to the plaintiff with a letter as follows:

"Boston, Oct. 15, 1911.

Geo. B. Ager, Agt.,
B. & A. R. R., Boston.

DEAR SIR:

We are returning to you your several supplementary bills for additional charges of freight on cars of melons received from the Payette Valley Melon Ass'n., of Payette, Idaho.

These goods were commission goods and the account sales were rendered on the basis of your original charges.

Our account with the shipper is closed and we are not in a position to pay any additional charges, as we have no funds of theirs in our hands. We would therefore refer you to them.

Yours truly,
(Sgd.) YORK & WHITNEY CO.

(Stamp:) Boston & A. R. R. Received Oct. 17, A. M."

28. The freight bills as rendered to and paid by the defendant were for the freight and other charges as specified in the tariffs, accruing between Payette and Chicago, except that in the case of car P. F. E. 8877 there was an overcharge of $.11, in the case of car P. F. E. 7701 there was an overcharge of $.54, and in the case of car P. F. E. 1963 there was an overcharge of $9.84.

29. The agents of the Chicago & Northwestern Railroad Company, in reconsigning the said cars to Boston, should have added to the charges appearing on the waybills additional charges to cover the transportation and icing from Chicago to Boston, but by mistake failed to do so, and in consequence of his mistake the dis-
31 puted undercharges on the said six cars arose. This error was repeated by the plaintiff in rendering the bills in question to the defendant.

30. The tariffs which governed these shipments from Payette to Chicago and from Chicago to Boston were: Oregon Short Line tariffs, I. C. C. 1707 with two supplements, and I. C. C. 1748; Michigan Central tariff, I. C. C. 4022 with one supplement; and Lake Shore & Michigan Southern tariff, I. C. C. A-2474 with two supplements. These tariffs and supplements were duly posted, published and filed with the Interstate Commerce Commission as required by law.

31. Under the aforesaid tariffs the correct charges on said cars were as follows:

Transportation from Payette, Idaho, to Chicago, 75c. per 100 lbs.
Transportation from Chicago to Boston, 24,000 lbs. minimum, 39c. per 100 lbs.
Refrigeration, Payette to Boston, $65.00 per car.
If vents open to first re-icing station, additional regrigeration charge of $15.00 per car.
If cars not loaded at Payette within 48 hours after icing and placed for loading, a detention charge of $5.00 per car for every 24 hours or fraction thereof car is held in excess of first 24-hour period.

32. The amounts claimed by the plaintiff as undercharges on the said six cars as set forth in the first six items of the account annexed to its declaration are correct according to the said tariffs.

33. In so far as known, melons had never before been shipped from Idaho to Boston, there was no joint rate covering the entire distance, and the proper rate is ascertained by finding the through rate from Idaho to Chicago, Ill., and a proportional rate from Chicago, Ill., to Boston, Mass., over different roads and contained in said tariffs issued by the several roads. The defendant had no actual knowledge of these facts, unless and until informed by said letter dated September 14, 1911.

34. The facts with reference to the seventh item in the account annexed to the declaration are as follows:

On April 25th, 1912, M. Piowaty & Sons shipped a car of pie plant from Chicago, Ill., consigned to the defendant at Boston, Mass., in car F. G. E. 18787, a refrigerator car, with instructions to keep car iced to destination. The car was iced at Chicago, for which a charge of $10 was made. It was again iced at Junction Yards, Detroit, for which a charge of $5 was made. It was also iced at Suspension

Bridge, N. Y., for which a charge of $1.50 was made. On
32 April 28, 1912, one thousand pounds of ice were added at Karners, New York, for which a charge of $1.25 was made. These were all regular icing stations. The car arrived at Boston, in the usual course of freight transportation, on April 29, 1912. Before removal of the pie plant by the defendant it received a delivery check from the plaintiff showing freight charges thereon and also the icing charges as above, except the charge of $1.25. After removal from the car, the defendant sold the merchandise immediately, and on April 29th the plaintiff rendered the defendant a bill for said shipment setting forth the freight and the icing charge of $10, $5 and $1.50 as aforesaid, but in no way mentioning the charge of $1.25 for icing at Karners, New York. The defendant had no knowledge that ice had been put in the car at Karners, New York, and did not suspect that the car would be iced more than twice. It was specified in the bill of lading covering said shipment that the car containing same should be kept iced to destination, and such icing at Karners was in fact necessary to keep car properly iced, and the defendant knew that said Karners was a regular icing station. The defendant immediately paid the amount of the charges as rendered on said bill, and on April 30, 1912, remitted the net balance of the proceeds of the sale of said car to the consignor, after deducting its commission, and the defendant has not had in its hands since that time any funds belonging to the said consignor. This additional charge of $1.25 was made under New York Central Icing Tariff, I. C. C. B-15299, and is correct as per said tariff and as stated in the account annexed to the plaintiff's declaration. On May 21, 1912, the plaintiff rendered the defendant a supplementary bill for this additional charge of $1.25 for icing at Karners, which the defendant declined to pay, notifying the plaintiff that it had closed its account with the shipper and that it had no funds of the shipper in its hands, and that this was a commission transaction. The bill of lading covering this shipment was delivered to the consignee never came to the possession of the defendant and the defendant had no knowledge of the same until informed by the plaintiff after the claim for this extra icing was made upon the defendant.

35. The facts with reference to the eighth item in the account annexed to the declaration are as follows:

On September 12, 1912, T. O. Swanson shipped a carload of peaches from Hamlin, N. Y., to defendant at Boston, Mass., in car M. D. T. 18029, a refrigerator car, with instructions to keep iced to destination. The car was iced at the starting point and in transit at West Albany, for which charges were made amounting to $12.50 and $5 respectively. Two tons of ice also were put in the car at Charlotte, New York, for which a charge of $5 was made. The car arrived at Boston in the usual course of freight transportation on September 16, 1912. Before removal of the peaches by the defend-
33 ant, it received a delivery check from the plaintiff showing freight charges thereon and also icing charges of $12.50 and $5, as above. After removal from the car, the defendant

sold the merchandise immediately. On September 16, 1912, the plaintiff rendered the defendant a bill for said shipment setting forth the freight and the icing charge of $12.50 and $5, as aforesaid, but in no way mentioning the second charge of $5 for icing at Charlotte, New York. The defendant had no knowledge that ice had been put in the car at Charlotte, New York, and did not suspect that the car would be iced more than twice. It was specified in the bill of lading covering said shipment that the car containing same should be kept iced to destination, and such icing at Charlotte was in fact necessary to keep car properly iced, and the defendant knew that said Charlotte was a regular icing station. The defendant immediately paid the amount of the charges as rendered on said bill, and on September 18, 1912, remitted the net balance of the proceeds of the sale of said car to the consignor, after deducting its commission, and the defendant has not had in its hands since that time any funds belonging to the said consignor. This additional charge of $5 was made under New York Central Icing Tariff, I. C. C. B-16483, and is correct as per said tariff and as stated in the account annexed to the plaintiff's declaration. On September 20, 1912 (after the defendant had remitted to the consignor) the plaintiff for the first time notified the defendant of, and rendered the defendant a supplemental bill for, this additional charge of $5 for icing at Charlotte, which the defendant declined to pay, notifying the plaintiff that it had closed its account with the shipper and that it had no funds of the shipper in its hands, and that this was a commission transaction. The bill of lading governing this shipment was delivered to the consignor, never came to the possession of the defendant and the defendant had no knowledge of the same until informed by the plaintiff after the claim for this extra icing was made upon the defendant.

36. The facts with reference to the ninth item in the account annexed to the declaration are as follows:

On September 13, 1912, T. O. Swanson shipped a carload of peaches from Hamlin, N. Y., to the defendant at Boston, M. D. T. car 11788, with instructions to keep car iced to its destination. The car was iced at the starting point and in transit at West Albany, for which charges were made amounting to $9.38 and $2.50 respectively. Two tons of ice also were put in the car at Charlotte, New York, for which a charge of $5 was made. The car arrived at Boston, in the usual course of freight transportation, on September 16, 1912. Before removal of the peaches by the defendant, it received a delivery check from the plaintiff showing freight charges thereon and also the icing charges of $9.38 and $2.50, as above. After removal from the car, the defendant sold the merchandise immediately, and on September 16, 1912, the plaintiff rendered the defendant a bill for said shipment, setting forth the freight and the icing charges of $9.38 and $2.50 as aforesaid, but in no way mentioning the charge of $5 for icing at Charlotte, New York. The defendant had no knowledge that ice had been put in the car at Charlotte, New York, and did not suspect that the car would be iced more than twice. It was specified in the bill of lading covering

said shipment that the car containing same should be kept iced to destination, and such icing at Charlotte was in fact necessary to keep car properly iced, and the defendant knew that said Charlotte was a regular icing station. The defendant immediately paid the amount of the charges, as rendered on said bill, and on September 18, 1912, remitted the net balance of the proceeds of the sale of said car to the consignor, after deducting its commission, and the defendant has not had in its hands since that time any funds belonging to the said consignor. This additional charge of $5 was made under New York Central Icing Tariff, I. C. C. B-16483, and is correct as per said tariff and as stated in the account annexed to the plaintiff's declaration. On September 20, 1912 (after the defendant had remitted to the consignor) the plaintiff for the first time notified the defendant of, and rendered the defendant a supplemental bill for, this additional charge of $5 for icing at Charlotte, which the defendant declined to pay, notifying the plaintiff that it had closed its account with the shipper and that it had no funds of the shipper in its hands, and that this was a commission transaction. The bill of lading governing this shipment was delivered to the consignor, never came to the possession of the defendant and the defendant had no knowledge of the same until informed by the plaintiff after the claim for this extra icing was made upon the defendant.

37. Said New York Central Icing Tariffs, I. C. C. B-15289 and I. C. C. B-16483 were duly posted, published and filed with the Interstate Commerce Commission, as required by law.

37*a*. The bills of lading covering the said shipments of pie plant and peaches were in the form prescribed by the "Official Classification" containing the classification of freight in force and applicable to said shipments and duly published and filed with the Interstate Commerce Commission, as required by law. Said bills of lading were signed by the shipper and the agent of the carrier issuing the same, and contained the following provision:

"Sec. 8. The owner or consignee shall pay the freight and all others lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

38. The defendant at the several times of shipment and delivery of all the merchandise in question was a dealer in fruit and produce at Boston, Mass.; a large portion of its business it handled as commission merchant, all of which was known to the plaintiff at the times when all said bills were issued and when said consignments were delivered to the defendant; said initial carriers and all the other carriers over whose particular lines all said freight moved maintained general soliciting freight agents at Boston, Mass., during all said time, and all the foregoing facts in this paragraph were also known to such agents. The defendant

was in no way interested in any of said produce except as commission merchant for the shippers, for the sole purpose of selling the same, for which it is entitled to a commission on the amount obtained therefor. These shipments in question were made to the defendant as commission merchant as aforesaid, which fact was communicated to the person at the plaintiff's freight office before delivery to the defendant of the said six carloads of cantaloupes, as aforesaid, but such information was not expressly communicated to the plaintiff as to the carload of pie plant and the two carloads of peaches, as above set forth, before the delivery of these goods to the defendant. The extent of the defendant's business was not fully known to the plaintiff and other carriers over whose roads the freight moved.

39. Produce dealers throughout the country consign and ship to the defendant and to other produce dealers at Boston, Mass., produce for sale on commission at the market prices, and it receives such consignments from persons entirely unknown to it. The said Payette Valley Melon Growers' Association was entirely unknown to the defendant and the defendant had never had any business with it before. The first information that the defendant had of the said six carloads of melons was a telegram that they were on the way, received the day before the first carload arrived, as aforesaid.

40. All produce hereinbefore described was perishable property, which required that the same be sold at once to avoid serious loss, and it is a custom of the trade among fruit and produce dealers at Boston, Mass., and especially commission merchants dealing in these goods, immediately to sell goods so consigned to them at the best market price and to remit the net amount received from such sales to the consignor, after deducting all known charges on said goods, and a successful conduct of the commission business especially requires immediate remittances.

41. The defendant's officers and agents will testify that for many years the defendant had received from the plaintiff and also from the Boston and Albany Railroad, its predecessor in conducting the freight terminal business at Boston, Mass., supplemental bills for freight charges, icing, terminal and other charges which were, through inadvertence, omitted from the original bill, as rendered and paid by the consignee in each case, and that in such cases where settlement had been made with the shipper the defendant had always returned said freight bills with a statement that the defendant had settled with its principal, that the goods were commission goods and that the defendant had no funds of the principal on hand to pay the additional charges, and referred the plaintiff to the consignor, giving the plaintiff such additional information as to the identity, location and responsibility of the consignor as it possessed, in order to enable the plaintiff, or the initial carrier, to collect the balance of lawful charges from the shipper and that no suit had ever been brought against this defendant to recover the amounts of such supplemental bills prior to this suit,

but that in case the defendant did have in its possession any funds belonging to the shipper, in such case, the defendant paid such supplemental bills out of such funds belonging to the shipper and charged the same to his account, and that there had been no change in this custom up to the several times the plaintiff delivered to the defendant the produce hereinbefore set forth.

42. Some time prior to September, 1911, the plaintiff sent to the defendant a request that the defendant execute with the plaintiff a contract, by the terms of which the plaintiff would agree that the defendant might be upon its weekly credit list, and, in consideration for this privilege, the defendant would agree with the plaintiff to pay the plaintiff all lawful charges for freight and other incidental expenses upon goods which might be consigned to the defendant at Boston, Mass., but the defendant expressly declined to sign such contract, and then informed the plaintiff that such contract would be disastrous to it since oftentimes it refused to accept consignments of highly perishable property sent to it at Boston, Mass., where the condition of the goods, the state of the market, and the responsibility of the shipper, or any of them, were not satisfactory to the defendant, and from that time to the present time the plaintiff has allowed the defendant to accept goods without paying the charges in advance, but the plaintiff has on the same day rendered the defendant a bill for the charges, and the same has been immediately paid.

43. At the time when the consignments hereinbefore described were respectively delivered nothing was said by the plaintiff to the defendant about paying the freight and other charges thereon, and the defendant did not agree to pay any charges at the time not disclosed to it, as aforesaid, except and unless as herein set forth.

44. The several tariffs governing the several shipments involved in this case were in the usual form, in bound pamphlets, the largest of which contains fifty-seven pages, each in cases closely printed, containing schedules, cross references, rules, regulations and indices. The tariffs are from time to time amended by the carriers by supplements, but only two supplements were in force at any one time. It is difficult for anyone not familiar with such schedules to ascertain the proper charge on any shipment; the plaintiff and the said initial carrier and other carriers were and are common carriers of freight engaged in interstate commerce, and at the time of said shipments in question employed men who were and are experts in such matters.

37 The said Ager had men employed under his direction, in his office, who usually answered telephone inquiries as to freight charges and who had had much experience in such matters. The defendant had no actual knowledge, except as herein disclosed, of the proper rate covering the several shipments in question, and in accepting said shipments and paying the said freight and other charges relied upon the amount disclosed by the bills first rendered and paid as correct, unless and until otherwise informed by said letter dated September 14, 1911, as set forth in paragraph 19a, in so far as the six carloads of cantaloupes are concerned, and the de-

fendant believed that the charges as billed were computed by experts employed by the plaintiff and the other carriers were correct.

15. All proper inference of fact may be drawn from the foregoing agreed facts, and additional evidence may be offered by either party in addition to the above agreed facts.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
By W. L. PARSONS,
Its Attorney.
YORK & WHITNEY COMPANY,
By ADAMS & BLINN,
Its Attorneys.

Filed Feb. 19, 1917.

Copy.
Attest:

FRANCIS A. CAMPBELL,
Clerk.

38

EXHIBIT "A"

A. F. A. 116

NEW YORK CENTRAL LINES

FREIGHT BILL 42006 M — BOSTON, MASS. 9/11/11

Pro

York & Whitney Consignee

To BOSTON & ALBANY RAILROAD, Dr.
(N. Y. C. & H. R. R. R. Co., Lessee)

For Charges on freight way-billed from Payette *via* OSL

WAY-BILL DATE	WAY-BILL NO.	CAR	CONSIGNOR	Original Point of Shipment	ORIGINAL CAR
8/31	486	P. F. E. 8877	Pt. Melon G. Assn		

NO. OF PACKAGES	ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
5	Jumbo Cts. Canteloupes			1500 Vents open		
228	Std. do do			5000 Refgr.		
95	Pony do do	20945	75	15720		22220
42	Special do do					
275						

253.26 267050 Stamped

N. Y. C. & H. R. R. R. Co.
Boston, Mass.
Paid Sept. 11, 1911
Geo. B. Ager, Agent
Per J. G. Alders, Asst. Cashier

Charges must be paid on delivery of freight.

Received payment for the Company,

EXHIBIT "B"

A. F. A. 79

NEW YORK CENTRAL LINES

42007 M
FREIGHT BILL — BOSTON, MASS. 9.11.11

Pro

Del to York & Whitney Consignee without BL

To BOSTON & ALBANY RAILROAD, Dr.
(N. Y. C. & H. R. R. R. Co., Lessee)

For Charges on freight way-billed from PAYETTE *via* OSL

WAY-BILL DATE	WAY-BILL NO.	CAR Initial & Number	CONSIGNOR	Original Point of Shipment	ORIGINAL CAR
1	491	PFE 4781	P M F ASSN		422

NO. OF PACKAGES	ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
8	Jumbo Cts Canteloupes			1500		
215	Std Do			5000		
111	Pony Do	21260	75			
46	SP C Do					
381				15945		22445

267582 9/16 670.47

N. Y. C. & H. R. R. R. Co.
Boston, Mass.
Paid Sep 20 1911
Geo. B. Ager, Agent
Per J. G. Alders, Asst. Cashier

Charges must be paid on delivery of freight.

Received payment for the Company,

EXHIBIT "C"

NEW YORK CENTRAL LINES

A. F. A. 79

FREIGHT BILL 42008 M
BOSTON, MASS.
9/11/11

Pro

YORK & WHITNEY
Consignee

To BOSTON & ALBANY RAILROAD, Dr.
(N. Y. C. & H. R. R. R. Co., Lessee)

For Charges on freight way-billed from PAYETTE *via* O S L

WAY-BILL DATE	WAY-BILL NO.	CAR Initial & Number	CONSIGNOR	Original Point of Shipment	ORIGINAL CAR
2	501	PFE 1324	PVM ASSN		21

NO. OF PACKAGES	ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
7	Jumbo Cts Canteloupes					
246	Std Do			1500		
76	Pony Do			5000		
18	SPC Do	20695	75	15521		22021
347						

N. Y. C. & H. R. R. R. Co.
Boston, Mass.
Paid Sept. 20 1911
Geo. B. Alger, Agent
Per J. G. Alders, Asst. Cashier

267582

Charges must be paid on delivery of freight.

Received payment for the Company,

EXHIBIT "D"

NEW YORK CENTRAL LINES

A. F. A. 79

FREIGHT BILL 42561 BOSTON, MASS. E 9/12/11

Pro

York & Whitney
Consignee

To BOSTON & ALBANY RAILROAD, Dr.
(N. Y. C. & H. R. R. R. Co., Lessee)

For Charges on freight way-billed from Payett *via* SP

WAY-BILL DATE	WAY-BILL NO	CAR Initial & Number	CONSIGNOR	Original Point of Shipment	ORIGINAL CAR
4	507	PLE 9448			21

NO. OF PACKAGES	ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
1	JUBO CRT. CANT LPS			500		
246	STD DO DO			1500		
69	PONY DO DO			5000	REFG	
16	SPC DO DO	20775	75	15581		22581
332						

N. Y. C. & H. R. R. R. Co.
Boston, Mass.
Paid Sep. 23 1911
Geo. B. Ager, Agent
Per Wm. V. Nolan, Asst. Cashier

267652

Make Checks Payable to
BOSTON & ALBANY RAILROAD
(N. Y. C. & H. R. R. R. Co., Lessee)
Mail to 187 Kneeland Street

Received payment for the Company,

EXHIBIT "E"

NEW YORK CENTRAL LINES

A. F. A. 79

FREIGHT BILL 43129 E — BOSTON, MASS. Pro 9/15/11

YORK & WHITNEY
R 358—9/27/V

To BOSTON & ALBANY RAILROAD, Dr.
(N. Y. C. & H. R. R. R. Co., Lessee)
For Charges on Articles named below
#21

For Charges on freight way-billed from PAYETT *via* OSL

WAY-BILL DATE	WAY-BILL NO.	CAR Initial & Number	CONSIGNOR	Original Point of Shipment	ORIGINAL CAR
5	523	PLE 7701	R M G		

NO. OF PACKAGES	ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
				5000	REFG	
251	CRT CANT			15740		
88	PONY DO			1500		
8	SP DO	20915	75	500	DET	
347						22740

267920

N. Y. C. & H. R. R. R. Co.
Boston, Mass.
Paid Sep. 28 1911
Geo. B. Ager, Agent
Per J. P. Wittet, Asst. Cashier

Make Checks Payable to
BOSTON & ALBANY RAILROAD
(N. Y. C. & H. R. R. R. Co., Lessee)
Mail to 187 Kneeland Street

Received payment for the Company,

EXHIBIT "F"

NEW YORK CENTRAL LINES

A. F. A. 79

FREIGHT BILL 44340 E — BOSTON, MASS. Pro 9/19/11

YORK & WHITNEY
R 359—9/27/V

To BOSTON & ALBANY RAILROAD, Dr.
(N. Y. C. & H. R. R. R. Co., Lessee)
For Charges on Articles named below
#24

For Charges on freight way-billed from PAYETT *via* OSL

WAY-BILL DATE	WAY-BILL NO.	CAR Initial & Number	CONSIGNOR	Original Point of Shipment	ORIGINAL CAR
11	566	PLE 1963			

NO. OF PACKAGES	ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
				500	DET	
203	STD CTRS CANTS			1500		
				6000	REFG	
140	PONTY DO			15235		23235
3	SPC DO					
1	STD DO	20335	75			
347						

267920

N. Y. C. & H. R. R. R. Co.
Boston, Mass.
Paid Sep. 28 1911
Geo. B. Ager, Agent
Per J. T. Wittett, Asst. Cashier

Make Checks Payable to
BOSTON & ALBANY RAILROAD
(N. Y. C. & H. R. R. R. Co., Lessee)
Mail to 187 Kneeland Street

Received payment for the Company,

EXHIBIT "G"

Uniform Bill of Lading—Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908.

OREGON SHORT LINE RAILROAD COMPANY.

Shippers No. .....

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE.

Agents No. .....

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading, at Payette, Idaho, Sept. 10, 1911, from P. V. M. G. Assn., the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from.....

to.....*is in Cents per* 100 *Lbs.*

IF..Times 1st Class	IF 1st Class	IF 2d Class	IF Rule 25	IF 3d Class	IF Rule 26	IF Rule 28	IF 4th Class	IF 5th Class	IF 6th Class	IF Special per.....	IF Special per.....

(Mail Address—Not for purposes of Delivery.)

Consigned to York & Whitney Co.

Destination, Boston State of Mass. County of.....

Route, O. S. L. U. P. C. & N. W. NYC & B&A Car Initial P.F.E.

Car No. 1963

No. Packages	Description of Articles and Special Marks	Weight (Subject to correction)	Class or Rate	Check Column
203	Standard cants	13195		
140	Pony	7000		
3	Special or Flat B/L 9-10-12 noon	75		
1	standard cant in bracing	65		
		20335		
	O. R. S. L&C. "Car under ice. Run with vents open and plugs out to Pocatello Put in plugs and close vents at Pocatello and re-ice at all regular icing stations."			

If charges are to be prepaid, write or stamp here, "To be Prepaid."

.....

Received $ ..... to apply in prepayment of the charges on the property described hereon.

..... Agent or Cashier.

Per .....

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$.....

P. V. M. G. Assn., Shipper.
Per A. E. Wood, Mgr.
E.W.T.

G. F. Johnson, Agent.
Per.....

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

42 *Conditions.*

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable despatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

43 Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in
44 this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or, from collision stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

45 [Endorsed:] No. —. The New York Central & Hudson River Railroad Company vs. York & Whitney Company. Report. Suffolk County.

46 *Copy of Opinion of Supreme Judicial Court for the Commonwealth.*

47 COMMONWEALTH OF MASSACHUSETTS.

Boston, February 11, 1920.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of New York Cent. & H. R. R. R. vs. York & Whitney Co., 230 Mass., 206, decided on the 24th day of May, 1918.

HENRY WALTON LUFT,
Reporter of Decisions.

48 RUGG, *C. J.*:

This case comes before us on a report, which states that it was tried before a jury on an "Agreed Statement of Facts," which covers with its exhibits more than twenty printed pages. Several of its paragraphs begin with the statement that certain persons "will testify" as narrated. The report further says that the defendant "introduced in evidence the original freight bills. * * * There was no further evidence offered by either side." It follows that the case was tried upon the statement of agreed facts submitted as evidence, which, together with the other evidence, was the basis from which the ultimate decisive facts so far as necessary must be determined. Where more than one rational inference can be drawn from these, a question of fact is presented. It is when only one conclusion is possible that a point of law alone is raised. Frati v. Jannini, 226 Mass. 430, 432. Atlantic Maritime Co. v. Gloucester, 228 Mass. 519, 522, 523. See Donahoe v. Turner, 201 Mass. 274.

49 This is an action of contract to recover a balance claimed to be due for freight and refrigeration charges on various carloads of produce shipped in interstate commerce and consigned to the defendant at Boston. The plaintiff as the terminal carrier failed to collect the full amount of the correct tariff rates at the time of delivery. One group of the shipments relates to six carloads of cantaloupes originating at Payette, Idaho. "Straight Bills of Lading" in the form established by the interstate commerce commission were issued for those cars, each signed by the shipper and by the agent of the carrier, but they all were retained by the shipper, never came into the possession of the defendant, and it had no actual knowledge that any had been issued or of the terms thereof. Immediately upon being informed of the arrival of the first of these six cars, an agent of the defendant inquired of an agent of the plaintiff what the freight charge was, saying also that the six carloads of cantaloupes expected by the defendant from Payette, Idaho, "were

commission goods and that the defendant wished to know what the charges would be before it decided to accept the consignment." Information later was given to the defendant that the rate was $222.20, which was $108.49 less than the lawful rate established by the tariffs filed with the interstate commerce commission.

50 It is not now open to discussion that the rates published according to the requirements of the federal interstate commerce act are absolutely binding upon all persons who are parties to a contract of interstate transportation. They have the force of a statute. They cannot be varied under any pretext. The carrier cannot lawfully depart from them. It was said in Kansas City Southern Railway v. Carl, 227 U. S. 639, at page 653, "Neither the intentional nor accidental mis-statement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed." It was "the purpose of the act to have but one rate, open to all alike and from which there could be no departure." Louisville & Nashville Railroad v. Maxwell, 237 U. S. 94, and cases collected at page 97. Dayton Coal & Iron Co. Ltd. v. Cincinnati, New Orleans & Texas Pacific Railway, 239 U. S. 446. Pennsylvania Railroad v. International Coal Mining Co., 230 U. S. 184, 197. It was said in Erie Railroad v. Stone, 244 U. S. 332, at page 336, "The rules and regulations, duly published and filed, which in any wise affect the rates or the value of the service to be rendered are controlling upon both parties to the shipping contract. (Act of June 29, 1906, 34 Stat. 586, s. 2.) The binding force of these contracts and regulations has been affirmed in many cases." Boston & Maine

51 Railroad v. Hooker, 233 U. S. 97, 112. Pierce v. Wells Fargo & Co. 236 U. S. 278, 284, 285. Southern Railway v. Prescott, 240 U. S. 632, 638. The question is, whether these rates are binding upon a consignee who is not a party to the bill of lading, who notifies the carrier that he is not the owner of the goods transported but merely an agent to dispose of them on commission, and who decides, after having had stated to him by the carrier the amount of charges said by it to be due, whether he will receive or decline to accept the consignment. More broadly stated the question is, whether everybody who deals with an interstate shipment, although not the owner of the goods, is bound inexorably to know and to pay the lawful and correct rates established by the tariffs filed and published in compliance with the interstate commerce act, even though he is not a party to the shipment, is not bound to pay any rate at all except by his own volition exercised after the shipment is in progress or at an end, and decides to pay only on the assumption that the charge stated by the carrier is the extent of his obligation. This point relates to the interpretation of an act of Congress, respecting which a decision by the Supreme Court of the United States is final and binding upon all other courts. This precise point has not been decided by that court so far as we are aware. We must, therefore, decide it upon what appear to be the governing principles of law

in the light of the decisions of that tribunal upon kindred and analogous questions.

52 The decisions already cited have settled that parties to an interstate shipment or carriage are bound, the carrier to collect and the shipper or owner to pay, the lawful rate no matter what mistake or misunderstanding may have entered into any statement of the rate. Congress has determined that the true and lawful rate, fixed according to the methods prescribed by it, shall have the force and effect of a statute and shall be immutable by any conduct of the parties. That principle has been stated in the strongest possible form of expression.

There is ground for holding that the same principle should apply to all persons who may seek to deal with goods transported by interstate carriage to the extent of paying the charges for transportation. The purpose of the act being, as has been stated many times in various forms of words, to prevent utterly any discrimination between different shippers in interstate commerce, and to put everybody absolutely upon the same footing as to the rates in interstate commerce, there is much to be said in favor of the proposition that everybody, whether a party or a stranger to the contract for shipment, must pay the one and only legal rate if he undertakes to pay any rate at all. It may be that the evil of discrimination in rates can be exterminated only by such drastic interpretation.

But the reasons against this view seem to us stronger. Transportation of goods in interstate commerce rests upon contract. Nobody is under legal compulsion to enter into such a contract. It
53 is an economic adventure. Whether one shall enter into it depends in large measure, if not entirely, upon business considerations and a determination whether it will be profitable or not. After one enters into such a contract, he is bound by law as to the rate. The shipper both theoretically and practically has within his reach the facilities for ascertaining the lawful rate, because every carrier is required by section 6 of the act (as amended by the act approved June 29, 1906) to keep schedules of rates and charges "posted in two public and conspicuous places in every depot, station, or office * * * where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected." It is true that the schedule becomes operative upon filing with the interstate commerce commission and furnishing copies to its officers even though not thus publicly posted. Texas & Pacific Railway v. Cisco Oil Mill, 204 U. S. 449, 451 n.

But it is the theory of the law that opportunity to ascertain the true rate must be open to one who wants to make a contract, the profit or loss of which may depend wholly upon the rate. The shipper is a necessary party to the contract for interstate shipment. Goods cannot be carried unless some one sends them. He must be bound to pay the lawful rate, unless by the contract of transporta-
54 tion, manifested usually by the bill of lading, he is not liable for any rate. But the consignee is not a necessary party to a contract for interstate shipment. The same opportunity is not or

may not be open to him under the law to ascertain the true and lawful rate. That is illustrated by the facts in the case at bar. No through rate had been established on cantaloupes from Payette, Idaho, to Boston. So far as known, melons had never before been shipped from Idaho to Boston. The lawful rate could be found only by adding the rate of the Oregon Short Line Railroad from Payette to Chicago, and the rates of the Lake Shore and Michigan Southern Railroad and other railroads from Chicago to Boston. These rates were to be found by examination of the tariffs issued by these several railroads. It is common knowledge that neither of these railroads above named maintain tracks in this Commonwealth, and hence there is no place here where these rates are required by the law to be posted publicly. No practicable means, therefore, were open to the defendant to ascertain the lawful rate on the carload of perishable goods such as cantaloupes within such time as would enable it to receive and sell the goods before they would become worthless. It never had had anything to do with the shipper. The whole question, whether it could afford to receive the cantaloupes on consignment, depended on the freight charges to be paid. Under these circumstances, the only way in which the business could go forward was for it to take the word of the carrier as to the charge to be paid.

55 It seems to us more rational to hold that the inexorable provisions of the federal law as to rates are applicable only to those who expressly or by implication are or become parties to the contract of transportation. Whether one is or has become a party to that contract must be determined by the general principles of the common law. As was said in Cincinnati, New Orleans & Texas Pacific Railway v. Rankin, 241 U. S. 319, 325, 327, "The shipment being interstate, rights and liabilities of the parties depend upon acts of Congress, the bill of lading, and common law rules as accepted and applied in federal tribunals." A consignee who is not the owner of goods, and who is to receive them only on commission, and who notifies the carrier to this effect, is not thereby necessarily a party to the contract of carriage. It was said by Chief Justice Pigeon in Boston & Maine Railroad v. Whitcher, 1 Allen, 497, at page 498, "no case can be found which goes the length of holding that an agent is liable for the freight of goods sent to and received by him, when his agency is known to the carrier at the time of the delivery of the goods, and when there is no stipulation in the contract of transportation by which the consignee is to pay the freight. In such a case, the essential elements of a contract are wanting. There is nothing from which an intent on the part of the shipper or carrier to charge the agent, or an agreement by the agent to pay the freight, can be inferred. A mere naked consignment to an agent does not make him liable for the freight, where the agency is known, and there is no stipulation that the consignee shall pay freight."

Old Colony Railroad v. Wilder, 137 Mass. 536.

56 The bill of lading as to the first car never was sent to the defendant, and it did not know its terms. Since it is required by s. 20 of the act as amended by the Carmack amendment, (34 U. S.

89, at large, 593,) that a bill of lading or receipt must be issued by the carrier, the defendant must be presumed to know that. But the defendant cannot be presumed to know the terms of the bill of lading. If it be assumed in favor of the plaintiff that the defendant was bound to know also the terms of the uniform bill of lading, that would not go far enough to hold the defendant to pay the lawful rate. A uniform bill of lading for interstate shipments was established by the report of the interstate commerce commission in the matter of Bills of Lading, I. C. C. Rep. 346, but it there was said at page 349 that this "bill of lading is designed for use in connection with the movement of miscellaneous freight and general merchandise and as a substitute for the bills now in use in the carriage of this description of property. It is not intended to take the place of special bills of lading which are issued on particular commodities of such a nature or so handled as to require exceptional provisions, such as live stock, for example, and perhaps perishable property." The goods here in question were perishable. There is nothing in this record to show that the defendant knew or had reason to know that the uniform bill of lading was issued in this instance and that a special bill different in form as applicable to perishable
57 goods might not have been used by the shipper and receiving carrier. The defendant told the plaintiff that it was receiving these goods not as owner but merely on commission, and that it would not accept them until the plaintiff informed it upon what terms it would release the goods to it. When those terms were stated it accepted them. Its agreement was not a general one to pay the legal tariff, but a special agreement to pay only the amount demanded. Central Railroad of New Jersey v. MacCartney, 39 Vroom, 165. Central of Georgia Railway v. Southern Ferro Concrete Co., 193 Ala. 108. Its determination whether it would receive or decline the consignment, a determination which it had an unrestricted right to make either way without violating any duty to anybody, depended upon the amount demanded of it for charges. The defendant had no interest in the contract between the shipper and the carrier. For aught the defendant knew or was required to know, the acceptance from it of this payment by the carrier, if it should turn out to be partial, would not affect the carrier's right to collect the balance from the shipper, who was under the primary liability as shipper and owner. See Georgia, Florida and Alabama Railway v. Blish Milling Co. 241 U. S. 190, 197. The clause in the bill of lading was that the "owner or consignee" should pay the freight. But the defendant did not claim nor receive the goods under the bill of lading. The bill of lading issued to the shipper was not an "order" but
58 a "straight" bill of lading and never came to the possession of the defendant and it did not know its terms. It is not necessary to consider what would be the rights and obligations of these parties if the bill of lading had contained the express stipulation that the consignee alone should pay the freight as a condition precedent to delivery to him.

As to the first car of cantaloupes, the plaintiff expressly states in its argument and brief that it "does not base its claim on an implied

agreement arising at common law, but on the interstate commerce act and the interstate bill of lading." We are of opinion, therefore, that under the circumstances here disclosed it cannot recover from the defendant on this item.

The facts are different as to the other five cars of cantaloupes in this particular. The defendant wrote to the freight traffic manager of the plaintiff, asking for the rates on cantaloupes under refrigeration from Payette, Idaho, to Boston, with reference to the tariffs. A reply was made to this letter by the plaintiff's general freight agent, giving the correct rates, with specific references to the published tariffs. It was found by the jury upon adequate facts that this letter of information was received by the defendant before it accepted any of the other five cars of cantaloupes. Marston v. Bigelow, 150 Mass. 45, 53, 54. The traffic manager and the general freight agent both were higher in authority than the freight agent at the Kneeland Street freight office and others there employed, who stated to
59 the defendant the amount of the freight charges on the successive cars as they arrived. The plaintiff was obliged under the law to state accurately in writing the applicable rate in response to the defendant's request. Act of Congress approved June 18, 1910, c. 309, s. 9, amending s. 6 of the original act (U. S. St. 1887, c. 104) 36 U. S. Sts. at Large, 548. Hence, this statement being correct, the defendant was bound to know that it was authoritative. The defendant, therefore, had at hand the lawful freight rate on these cars. By simple computation it could have ascertained the lawful charges and by comparison it could have discovered that the charges set forth in the plaintiff's statement were too small. It was bound to know, also, that the only charge which the plaintiff lawfully could make was that established by the published tariff. Its inquiry as to the legal rate in this connection bears some indication that it expected to pay that rate if it took the goods. The writing of the letter of inquiry and the receipt of the reply with the correct information, in conjunction with the other circumstances, was a sufficient basis for the finding that the defendant, although agent and not the owner of the last five carloads of cantaloupes, knew and expected to pay the legal rates, and accepted them understanding that the plaintiff looked to it for the payment of the legal charges. In respect to these five cars, the principles stated and applied in New York, New Haven & Hartford Railroad v. York & Whitney Co., 215 Mass. 36, are controlling. Pennsylvania Railroad v. Titus, 216 N. Y. 17.
60 The defendant knew what the legal rate was from this definite and detailed statement by the general officer of the plaintiff. It had the references to the tariffs on file. It had asked for the charges orally of an employee of the plaintiff of inferior rank and had been given a different and lower figure. It knew that if the plaintiff released the goods, its lien was gone and it would be relegated to its rights against the shipper in a distant State, who had contracted with a different carrier. The inference is warranted from these facts that acceptance of the consignment constituted by implication an agreement to pay the lawful freight rate.

The facts that it had been customary heretofore, when an under-

charge had been made and subsequently the mistake had been discovered and a bill for the undercharge sent by the plaintiff to the defendant, the latter had returned it with the statement that the account with the shipper had been closed and the defendant had no funds, were not decisive and were to be weighed with all the other evidence in determining the ultimate fact whether the defendant had agreed impliedly to pay the lawful rate. The same is true as to the fact that "Some time prior to September, 1911, the plaintiff sent to the defendant a request that the defendant execute with the plaintiff a contract, by the terms of which the plaintiff would agree that the defendant might be upon its weekly credit list, and, in consideration for this privilege, the defendant would agree with the plaintiff to pay the plaintiff all lawful charges for freight and other
61 incidental expenses upon goods which might be consigned to the defendant at Boston, Mass., but the defendant expressly declined to sign such contract, and then informed the plaintiff that such contract would be disastrous to it since oftentime it refused to accept consignments of highly perishable property sent to it at Boston, Mass., where the condition of the goods, the state of the market, and the responsibility of the shipper, or any of them, were not satisfactory to the defendant, and from that time to the present time the plaintiff has allowed the defendant to accept goods without paying the charges in advance, but the plaintiff has on the same day rendered the defendant a bill for the charges, and the same has been immediately paid." This also was not conclusive, but was to be considered in determining whether by fair inference the defendant had agreed to pay the lawful rate on these particular cars.

The salient facts, in addition to those already stated, relating to the other group of charges, are these: One carload of pie plant and two carloads of peaches were shipped in interstate commerce to the defendant as a commission merchant, and it had no other interest in them except to sell the goods for the shippers and remit the proceeds after deducting its disbursements and commission. This fact was not communicated to the plaintiff. The defendant immediately paid to the plaintiff the amount of freight charges demanded of it, sold the goods, all of which were perishable, and remitted to the shipper the balance due after making the proper deductions,
62 including the freight charges paid to the plaintiff. Later the plaintiff discovered that the charges collected of the defendant were too small and less than the lawful rate established under the interstate commerce act by reason of the unintentional omission of certain icing charges. It is sought now to recover the amount alleged to be the balance due by reason of these undercharges.

The defendant was at all these times a dealer in fruit and produce in Boston. A large part of its business was done as a commission merchant. But apparently its business was not exclusively of this character. Produce dealers throughout the country ship to the defendant and other produce dealers in Boston perishable fruit and produce for sale on commission at market prices. The defendant receives such shipments from persons entirely unknown to it. Per-

ishable goods must be sold at once to avoid serious loss. It is "a custom of the trade among fruit and produce dealers at Boston, Mass., and especially commission merchants dealing in these goods, immediately to sell goods so consigned to them at the best market price and to remit the net amount received from such sales to the consignor, after deducting all known charges on said goods, and a successful conduct of the commission business especially requires immediate remittances." The bills of lading issued were
63 "straight" and not "order," and were retained by the shippers and not sent to the defendant. Whether the defendant impliedly agreed to pay the lawful rate established by law was in our opinion a question of fact to be determined by fair inference from the agreed facts. The defendant was the consignee of all these goods. That was some evidence that it was owner. Rosenbush v. Bernheimer, 211 Mass. 146, and cases collected at page 149. That being a general principle of commercial law, the relations of the parties may be presumed to have proceeded on the footing that each had a right to rely upon it and knew that the other had a like right. The defendant sometimes had notified the plaintiff that it was receiving goods on commission merely, but did not give such notice with respect to the three cars here in issue. The defendant knew also that an inexorable and immutable rate was established by law, which the carrier was bound to charge to somebody, and that it might incur serious liability for failure to collect. That factor alone may the more readily incline the mind to the belief that both parties were dealing with each other on the footing that the lawful rate was to be collected. The defendant further knew that by releasing the goods from its custody the carrier would lose its lien and would be remanded to its contract rights if it should turn out that there had been an undercharge. As was said by Chief Justice Holmes in Spencer v. Spencer, 181 Mass. 471, at page 473, "Of course it does not matter whether the defendant expected to pay * * *
64 or not, the question is as to the natural import of his overt acts. Bohn Manuf. Co. v. Sawyer, 169 Mass. 477. Hobbs v. Massasoit Whip Co. 158 Mass. 194, 197. Again, it is not necessary that the defendant should have believed that the plaintiff expected pay. If as a reasonable man he should have understood from what he knew that such was the expectation, he would be bound."

The only essential difference between the claim for the balance above the undercharge on the first car of cantaloupes and those on these three cars, is that as to the former the defendant gave express notice to the carrier that it was not owner but simply commission merchant, while as to the latter it gave no notice but left the carrier to infer what it naturally might from the fact that it was consignee. But that difference appears to be enough to justify as matter of law a different conclusion. In Pennsylvania Railroad v. Titus, 216 N. Y. 17, it was said at page 21, respecting liability for freight rates upon a shipment in interstate commerce, "As to the plaintiff, the defendant stood in the relation of owner of the peaches. The bills of lading designated him as the consignee and did not disclose his agency or the ownership of Franklin, nor did he notify the

plaintiff before it delivered the peaches of either of such facts. At the time of the delivery the plaintiff did not have knowledge or notice, express or inferential, that the defendant was not the owner. Under those conditions, the plaintiff had the right, as a matter of law, to regard and deal with the consignee as the owner of the
65 peaches, and the consignee in permitting the plaintiff to so deal with him agreed, through implication, that he would pay the plaintiff's lawful charges for transporting and delivering the peaches to him. The consignee was the presumptive owner and when he accepted the peaches and had not informed the plaintiff and the plaintiff did not have knowledge or notice before the delivery that he was a factor or agent and that his acceptance of them would be in that capacity, he by the acceptance obligated himself to pay the unpaid legal charges of transportation. * * * The obligation arose from the presumptive ownership, the acceptance of the goods and the services rendered and benefits conferred by the plaintiff for charges made and to be paid." A decision to the contrary upon this point is, Central of Georgia Railway v. Southern Ferro Concrete Co., 193 Ala. 108. The judgment in that case is rested chiefly upon Central Railroad of New Jersey v. MacCartney, 39 Vroom, 165, 173. No reference is made in the opinion in the latter case to the interstate commerce act, and the decision proceeds seemingly upon the footing that it was an intrastate shipment. It seems to us that a different inference under those circumstances might be required by law or at least be permissible by a jury.

The present record does not render the liability of the defendant a pure question of law. The deductions which ought to be drawn from all the facts, which were submitted, were for the jury. No exception has been alleged to the general instructions given.
66 In view of all these conditions, we think the inferences drawn by the jury as shown by their answers, to the effect that the defendant impliedly agreed to pay the lawful charges, cannot be pronounced irrational. This branch of the case falls within the principles stated in New York, New Haven & Hartford Railroad v. York & Whitney Co., 215 Mass. 36.

The facts which have been narrated dispose of the contention that the plaintiff is estopped as matter of law to assert its claim to the balance unpaid by reason of the undercharges. They do not go to the length of warranting that ruling as matter of law. For the same reasons the defendant can have no recoupment.

No reversible error is disclosed by the manner in which the judge dealt with the several requests for instructions. The verdict was directly rightly upon the answers returned by the jury.

In accordance with the terms of the report, let the entry be

Judgment for the plaintiff on the verdict.

67 [Endorsed:] N. Y. C. & H. R. R. vs. York & Whitney Co. Certified Copy of the Opinion of the Supreme Judicial Court.

68 *Copy of Rescript.*

69 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, May 24, 1918.

In the Case of THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY

vs.

YORK & WHITNEY COMPANY,

pending in the Superior Court for the County of Suffolk.

Ordered, that the clerk of said court in said county made the following entry under said case in the docket of said court: viz.,—

Judgment for plaintiff on the verdict.

By the Court:

C. H. COOPER,
Clerk.

May 24, 1918.

Brief Statement of the Grounds and Reasons of the Decision.

The reasons of the decision are set forth at length in the opinion filed herewith, to which reference is made.

[Seal of The Superior Court.]

Copy.

Attest:

FRANCIS A. CAMPBELL,
Clerk.

70 [Endorsed:] No. 79333. Supreme Judicial Court for the Commonwealth. Rescript, Suffolk County. New York Central & Hudson River Railroad Co. vs. York & Whitney Co. Filed May 28th, 1918. Copy. K. F.

71 *Copy of Plaintiff's Motion for Entry of Judgment.*

72 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 79333.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY

vs.

YORK & WHITNEY COMPANY.

Plaintiff's Motion for Entry of Judgment.

Now comes the plaintiff and moves that the Court will order judgment forthwith to be entered for the plaintiff on the verdict.

By its Attorney, W. L. PARSONS.

Copy.

Attest:

FRANCIS A. CAMPBELL,
Clerk.

72a COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 79333.

Affidavit of Notice of Motion.

THE NEW YORK CENTRAL & HUDSON RIVER R. R. CO., Plff.

vs.

YORK & WHITNEY CO., Deft.

I, W. L. Parsons, Attorney for the above named plaintiff, make oath that on the 9th day of Dec. A. D. 1919, I gave notice in writing to the defendant's Attorney in the above entitled action that I should make a motion in the Equity Session, First Division of said court, at Boston on Thursday the 18th day of Dec. A. D. 1919, at 10 o'clock, in the forenoon, such notice was given by mailing a letter, postage prepaid, containing a copy of proposed motion directed to Amos L. Taylor, Esq., #40 Court St., Boston, Mass.

W. L. PARSONS.

Boston, Dec. 9, 1919.

Subscribed and sworn to before me,

LOUIS KOFSKY,
Justice of the Peace.

Copy.
Attach this affidavit to the motion.

73 [Endorsed:] No. 79333. The New York Central & Hudson River Railroad Company vs. York & Whitney Company. Plaintiff's motion for entry of Judgment. Filed December 10th, 1919. Suffolk, ss. Boston, Dec. 18, 1919. Mo. allowed by the Court. Attest: H. E. Bellew, Asst. Clerk. Copy. Attest: Francis A. Campbell, Clerk. W. L. Parsons, Attorney at Law, 344 South Station, Boston. K. F.

74 *Certificate of Judgment.*

75 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 79333.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY

vs.

YORK AND WHITNEY COMPANY.

In the above entitled action it is therefore considered and ordered by the Court on the eighteenth day of December, A. D. 1919, that judgment be entered for The New York Central & Hudson River Railroad Company, Plaintiff as aforesaid, against York and Whitney Company, Defendant as aforesaid, for the sum of eight hundred and thirty-eight dollars and ninety-seven cents damages, and costs of suit taxed at one hundred and thirty dollars and thirty-nine cents.

76 *Certificate of Clerk.*

77 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

I, Francis A. Campbell, Clerk of the Superior Court for Civil Business within and for the County of Suffolk, do hereby certify that the papers which are hereunto annexed are a true and attested copy of the Report to the Supreme Judicial Court for the Commonwealth, a certified copy of the Opinion of the Supreme Judicial Court for the Commonwealth, a true and attested copy of the Rescript from said Supreme Judicial Court for the Commonwealth; a true and attested copy of the Plaintiff's Motion for Entry of Judgment and a certificate of the judgment entered on the eighteenth day of Decem-

ber, A. D. 1919, in the action numbered 79333, The New York Central & Hudson River Railroad Company vs. York and Whitney Company.

In witness whereof I have hereunto set my hand and affixed the seal of said Court, at Boston, this second day of March, in the year of our Lord one thousand nine hundred and twenty.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

78 COMMONWEALTH OF MASSACHUSETTS:

I, John A. Aiken, Chief Justice of the Superior Court of the Commonwealth of Massachusetts,

Do certify, that Francis A. Campbell, Esq., whose signature is affixed to the papers hereunto annexed, is Clerk of said Superior Court, within and for the County of Suffolk, and hath the keeping of the files, records, and proceedings of said Court, within and for said County; Also, of the late Court of Common Pleas, within and for said County, and of the late Superior Court of the County of Suffolk aforesaid; that he is, by Law, the proper person to make out and to certify copies of the files, records, and proceedings of said several Courts; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed, of the files, records, and proceedings of the said Superior Court, is in due form.

In testimony whereof, I have hereunto set my hand and caused the seal of said Court to be hereunto affixed, this seventeenth day of March, in the year of our Lord one thousand nine hundred and twenty.

[Seal of the Superior Court.]

JOHN A. AIKEN,
Chief Justice of the Superior Court.

79 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

I, Francis A. Campbell, Clerk of the Superior Court within and for said County of Suffolk, hereby certify that the Honorable John A. Aiken, by whom the foregoing certificate was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, Chief Justice of the Superior Court of said Commonwealth, duly commissioned and qualified; to all of whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In witness whereof, I have hereto set my hand and affixed the seal of said Court, this seventeenth day of March, in the year of our Lord one thousand nine hundred and twenty.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

80 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To All Persons to Whom These Presents Shall Come, Greeting:

Know Ye,

That among our records of our Superior Court for the said County of Suffolk it is thus contained, the following being the portions of the record in the case stipulated by the parties as being necessary to the consideration of the questions to be reviewed.

81 *Writ of Error, with Return.*

82 UNITED STATES OF AMERICA, *ss:*

[Seal of the United States District Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Superior Court of the Commonwealth of Massachusetts, holden at Boston within and for the County of Suffolk and said Commonwealth, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court before you or some of you, being the highest court of law or equity of the Commonwealth of Massachusetts in which a decision could be had in the said suit between The New York Central & Hudson River Railroad Company, Plaintiff, and York & Whitney Company, Defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened, to the great damage of the said York & Whitney Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the sixteenth day of March in the year of our Lord one thousand nine hundred and twenty.

ARTHUR M. BROWN,
Deputy Clerk of the District Court of the United States, District of Massachusetts.

Allowed by

JOHN A. AIKEN,
Chief Justice of the Superior Court of Massachusetts.

83 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

And now, here, the Judges of the Superior Court for the Commwealth of Massachusetts, holden at Boston, within and for said County of Suffolk, make return of this writ by annexing hereto and sending herewith, under the seal of the said Superior Court, a true and attested copy of that part of the record and proceedings in the suit within mentioned, required by the stipulation of the parties with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, Francis A. Campbell, Clerk of said Superior Court, have hereto set my hand and the seal of said court this seventeenth day of March, A. D. 1920.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

[Endorsed:] (17.) Writ of Error to State Court. Suffolk Clerk's Office. Filed Mar 16, 1920. Francis A. Campbell, Clerk. Superior Court.

84 *Copy of Petition for Writ of Error.*

85 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

YORK & WHITNEY COMPANY, Plaintiff in Error,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant in Error.

Petition for Writ of Error.

To the Honorable John A. Aiken, Chief Justice of the Superior Court of said Commonwealth:

Respectfully represents—

York & Whitney Company, a corporation duly organized and existing under the laws of said Commonwealth and having a usual place of business at Boston, in said County of Suffolk; that on or about December 18, 1919 the said Superior Court for said County of Suffolk made and entered a final judgment against your petitioner in a certain action wherein The New York Central & Hudson River Railroad Company, a corporation duly organized and existing under the laws of said Commonwealth and having a usual place of business at said Boston, was plaintiff and your petitioner was defendant, for seven hundred seventy two and 57/100 (772.57) dollars, damages, and one hundred twenty eight and 41/100 (128.41) dollars, costs of suit and that execution for said sum has not been issued, all as will more fully appear by reference to the record and proceedings in said action, in which said final judgment, and pro-
86 ceedings had prior thereto, certain erors were committed to the prejudice of your petitioner, all of which will more fully appear from the asignments of error filed herewith; that said Superior Court is the highest Court of record in said Commonwealth in which a final judgment could be had and is the only Court which can issue execution thereon and that certain federal questions have been raised by said final judgment.

Wherefore your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the said Superior Court for the Commonwealth of Massachusetts for the correction of errors so complained of and that a transcript of the record, proceedings and papers in said action, duly authenticated, may be sent to said Supreme Court of the United States and that further proceedings by said Superior Court may be stayed upon the approval of the proper bond; all to the end that the said case may be reviewed

and determined by the said Supreme Court and that the judgment of said Superior Court may be reversed by the said Supreme Court.

YORK & WHITNEY COMPANY,
Plaintiff in Error.

March 16, 1920.

AMOS L. TAYLOR,
ADAMS & BLINN,
Counsel for the Plaintiff in Error.

Copy.
Attest:

FRANCIS A. CAMPBELL,
Clerk.

87 [Endorsed:] 79333. 15. York & Whitney Company Plaintiff in Error, vs. The New York Central & Hudson River Railroad Company, Defendant in Error. Petition for Writ of Error. Filed March 16, 1920. Copy. From the office of Adams & Blinn, 40 Court Street, Boston, Mass.

88 *Copy of Assignment of Errors.*

89 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 79333.

YORK & WHITNEY COMPANY, Plaintiff in Error,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant in Error.

Assignments of Errors.

And now comes the York & Whitney Company, the plaintiff in error, and respectfully submits that in the record, proceedings and decision and final judgment of the Superior Court of the Commonwealth of Massachusetts in the above entitled action, there are manifest errors in this, to wit:

1. The Court erred in so construing the Interstate Commerce Act (Act of Congress, approved Feb. 4, 1887, Chap. 104; 24 Stat. 379 with amendments and additions) as to hold, in substance, that it was bound by that act to find that the plaintiff in error, a commission merchant and neither the shipper nor the owner of the mer-

chandise in question, under straight bills of lading which never came to its knowledge, could not legally have entered into a contract with the defendant in error for the delivery of the merchandise in question to the plaintiff in error upon the payment of a less amount than the freight charges fixed in accordance with
90 such act, where the plaintiff in error had actual information of the correct tariff charges at or prior to delivery, and where the defendant in error had knowledge before delivery that the plaintiff in error was acting simply as commission merchant in the transactions.

2. The court erred in so construing the Interstate Commerce Act as to hold that it was bound by that act to find that the defendant in error was not estopped to maintain the action as to all but the first item of the declaration against the plaintiff in error, a commission merchant and neither the shipper nor the owner of the merchandise in question, under straight bills of lading which never came to its knowledge, for the excess of freight charges fixed by the tariffs adopted under said act over the amount stated by the defendant in error to the plaintiff in error at or before delivery.

3. The court erred in so construing the Interstate Commerce Act as to hold that it was bound by that act to find that the plaintiff in error, a commission merchant and neither the shipper nor the owner of the goods in question, under straight bills of lading which never came to its knowledge or possession, was not entitled to recoup against the defendant in error the damages suffered by the plaintiff in error for misrepresentation by the defendant in error of the amount of such charges.

4. The court erred in holding that the plaintiff in error under the facts of this case and the provisions of the Interstate Commerce Act, was bound to know that the only charge which the defendant in error could lawfully make in so far as it concerned this plaintiff in
91 error was that established by the published tariffs.

5. The court erred in deciding, in substance, that actual knowledge by the plaintiff in error of the correct tariff rates governing the shipments of cantaloupe in question from Payette, Idaho, prior to the delivery, rendered the plaintiff in error liable on items two to six, both inclusive.

6. The court erred in holding that under the Interstate Commerce Act the plaintiff in error, as commission merchant was liable for icing charges of which it had no knowledge and no reason to suppose that the shipment had been iced other than as disclosed at or before delivery.

7. The court erred in holding in effect that an implied promise on the part of the plaintiff in error to pay the charges in items two to nine, both inclusive, was based upon the tariff rates fixed under the Interstate Commerce Act.

8. The Court erred in holding in effect that the Interstate Commerce Act and the tariffs established thereunder in any way affected or determined the rights of the plaintiff in error in the decision of this case.

9. The court erred in holding in effect that because of the Interstate Commerce Act and the established tariffs the agreement between the plaintiff in error and the defendant in error as to items two to nine, both inclusive, was a general one to pay the legal tariff rates and was not a special agreement to pay the amount disclosed at or before delivery.

10. The court erred in holding in effect that under the
92 Interstate Commerce Act, the plaintiff in error was liable to pay anything under items two to six both inclusive of the declaration, although the defendant in error knew prior to delivery of the merchandise that the plaintiff in error was acting simply as commission merchant.

11. The court erred in holding that there was an agreement express or implied between the plaintiff in error and the defendant in error whereby the plaintiff in error became liable to pay the defendant in error the freight in question on the cantaloupe shipment in an amount other than demanded of the plaintiff in error at or before delivery.

12. The court erred in holding that there was an agreement express or implied between the plaintiff in error and the defendant in error whereby the plaintiff in error became liable to pay the defendant in error the icing charges upon the pie plant and peaches in question to an amount other than disclosed to it at or before delivery.

13. The court erred in holding that the said Interstate Commerce Acts have made any changes in the law with respect to the liability of the plaintiff in error for freight and icing charges as consignee, when acting as commission merchant for the shipper, when the fact that it was acting as such commission merchant was communicated to the defendant in error at or prior to delivery.

14. The court erred in holding that the said Interstate Commerce Acts have made any changes in the law with respect to the liability
93 of the plaintiff in error for freight and icing charges as consignee, when acting as commission merchant for the shipper.

15. The court erred in holding that the plaintiff in error is liable for the balance of the icing charges on the pie plant and peaches in question, claimed in this action, although the plaintiff in error asked of and was informed by the defendant in error the amount of all freight and icing charges and was induced to accept the goods in question from the defendant in error on the theory that all charges for which the plaintiff in error was liable were disclosed to it at or before delivery, after which it immediately sold the produce and

remitted to the shipper the net balance, retaining no funds to meet other charges.

YORK & WHITNEY COMPANY,
By AMOS L. TAYLOR,
ADAMS & BLINN,
Attorneys.

[Seal of The Superior Court.]

Copy.
Attest:

FRANCIS A. CAMPBELL,
Clerk.

94 [Endorsed:] Suffolk, ss. Superior Court. No. 79333. York & Whitney Company, Plaintiff in Error, vs. The New York Central & Hudson River Railroad Company, Defendant in Error. Assignments of Errors. Filed Mar. 16, 1920. Copy. From the office of Adams & Blinn, 40 Court Street, Boston, Mass. A. S. N.

95 *Original Citation, with Acceptance of Service.*

96 Citation on Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to The New York Central & Hudson River Railroad Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the City of Washington, District of Columbia, on the* twelfth day of April next, pursuant to a Writ of Error filed in the Clerk's Office of the† Superior Court of the Commonwealth of Massachusetts wherein York & Whitney Company, a corporation duly established and existing under the laws of said Commonwealth and having a usual place of business in said Boston is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John A. Aiken, Chief Justice of the Superior Court of the Commonwealth of Massachusetts this sixteenth day of March, in the year of our Lord one thousand nine hundred and twenty.

[Seal of The Superior Court.]

JOHN A. AIKEN,
Chief Justice of the Superior Court of the Commonwealth of Massachusetts.

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*Not exceeding 30 days from the date of signing.
†Name of Court to which Writ of Error is directed.

67 Boston, Mass., March 16, 1920.

I, the undersigned, attorney of record for the defendant in error in the within entitled action, hereby acknowledges due service of the within citation and hereby enter an appearance for said defendant in error in the Supreme Court of the United States.

WILLIAM L. PARSONS,
Attorney for The New York Central & Hudson River Railroad Company.

——— Clerk's Office. Filed Mar. 16, 1920. Francis A. Campbell, Clerk Superior Court.

68 Copy of Bond.

69 *Bond on Writ of Error.*

Know all Men by these Presents, That we, the York & Whitney Company, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, and having a usual place of business at Boston, in said Commonwealth, as principal, and George M. York, as surety, are held and firmly bound unto The New York Central & Hudson River Railroad Company, a corporation duly organized and existing under the laws of said Commonwealth and having a usual place of business at said Boston, in the full and just sum of two hundred and fifty (250) dollars to be paid to the said The New York Central & Hudson River Railroad Company, its certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated the sixteenth day of March in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately at a term of the Superior Court held at Boston, in the County of Suffolk, and said Commonwealth, on the eighteenth day of December, 1919, in a suit depending in said Court between The New York Central & Hudson River Railroad Company and said York & Whitney Company judgment was rendered against the said York & Whitney Company and the said York & Whitney Company having procured a writ of error and filed a copy thereof in the Clerk's office of said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The New York Central & Hudson River Railroad Company citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such, That if the said York & Whitney Company shall prosecute its said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

Signed, sealed and delivered in presence of
AMOS L. TAYLOR.

YORK & WHITNEY COMPANY, [SEAL.]
Per FRANKLIN O. WATSON, *Treas.* [SEAL.]
GEORGE M. YORK. [SEAL.]

Approved and to operate as a stay of proceedings, by agreement.

JOHN A. AIKEN,
Chief Justice of the Superior Court
of the Commonwealth of Massachusetts.

Copy.

Attest:

FRANCIS A. CAMPBELL,
Clerk of the Superior (Civil) Court.

[Endorsed:] Filed March 16th, 1920. Copy.

100 *Copy of Stipulation as to Record.*

101 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 79333.

YORK & WHITNEY COMPANY, Plaintiff in Error,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Defendant in Error.

Stipulation as to Record.

[Seal of the Superior Court.]

It is hereby stipulated and agreed by and between the parties in view of the fact that both parties have brought petitions for writ of error, that the clerk of said Superior Court may make return under only one of said writs and that such return may be used in both proceedings and that a certified copy of the record now on file in the Supreme Court of the United States at Washington may be accepted as a part of such return concerning the matters therein set forth, and that the only other matters to be contained in such return under said writ of error shall be the petitions for the writ of error, citations, bonds and assignments of error, and proceedings in said Superior Court thereunder with this stipulation; and further, in view of the fact that both parties have filed an application for writ of certiorari in said action, that such return may be used for the certified copy

of the record required to be furnished with such petitions and
102 that if a writ of certiorari should issue, the same may be taken to be the return on such writs and be used in each case.

AMOS L. TAYLOR,
ADAMS & BLINN,
Attorneys for York & Whitney Company.
WILLIAM L. PARSONS,
Attorney for The New York Central & Hudson River Railroad Company.

Copy.

Attest:

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

103 [Endorsed:] Suffolk, ss. Superior Court. No. 79333. York & Whitney Company, plaintiff in error, vs. The New York Central & Hudson River Railroad Company, defendant in error. Stipulation as to Record. Filed March 16th, 1920. Copy. From the office of Adams & Blinn, 40 Court Street, Boston, Mass.

104 All and singular which premises we have held good by the tenor of these presents to be exemplified, in accordance with the stipulation filed by the parties indicating the portions of the record necessary to the consideration of the question to be reviewed. In testimony whereof, we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, John A. Aiken, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this seventeenth day of March, in the year of our Lord one thousand nine hundred and twenty.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

105 Supreme Court of the United States, October Term, 1919.

No. 802.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plaintiff in Error,

vs.

YORK & WHITNEY COMPANY.

On Petition for Writ of Certiorari to The Superior Court of the State of Massachusetts.

On consideration of the petition for a writ of certiorari herein to the Superior Court of the State of Massachusetts, and of the argument of counsel thereupon had, as well in support of as against the same, it is now here ordered by this Court that the said petition be, and the same is hereby, granted, the transcript of record on the writ of error to stand as a return to the writ of certiorari.

April 26, 1920.

106 [Endorsed:] File No. 27,557. Supreme Court of the United States, October Term, 1919. Term No. 802. Order on Petition for Writ of Certiorari. Filed April 26, 1920.

107 Supreme Court of the United States, October Term, 1920.

Nos. 280 & 281.

No. 280.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plaintiff in Error,

vs.

YORK & WHITNEY COMPANY.

No. 281.

YORK & WHITNEY COMPANY, Plaintiff in Error,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

In Error to the Superior Court of the State of Massachusetts.

It is hereby stipulated and agreed by and between counsel for the parties to the above entitled cases that, inasmuch as the transcripts of records sent up in return to the writs of error sued out by both

parties are identical with the exception of the writ of error papers bringing the cases into this Court, it is unnecessary to print both records, and that the record in No. 280 be printed in its entirety, and pages 1 to 81 of the record in No. 281 be omitted in printing as being identical with those pages in No. 280, and that only the writ of error papers in No. 281 need be printed, the cost of printing to be divided between the parties.

(Signed) W. L. PARSONS,
Counsel for N. Y. C. & H. R. R. R. Co.

(Signed) AMOS L. TAYLOR,
Counsel for York & Whitney Company.

Endorsed: File No. 27,557, etc. Supreme Court U. S. October Term, 1920. Term Nos. 280 & 281. N. Y. C. & H. R. R. R. Co., P. E., vs. York & Whitney Co. York & Whitney Co., P. E., v. N. Y. C. & H. R. R. Co. Stipulation as to printing record. Filed Aug. 19, 1920.

Endorsed on cover: File No. 27,557. Massachusetts Superior Court. Term No. 280. The New York Central & Hudson River Railroad Company, plaintiff in error, vs. York & Whitney Company. Filed March 18th, 1920. File No. 27,557.

1-82 UNITED STATES OF AMERICA, *ss:*

[Seal of the United States District Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Superior Court of the Commonwealth of Massachusetts, holden at Boston within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court before you or some of you, being the highest court of law or equity of the Commonwealth of Massachusetts in which a decision could be had in the said suit between The New York Central & Hudson River Railroad Company, Plaintiff, and York & Whitney Company, Defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened, to the great damage of the said The New York Central & Hudson River Railroad Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the Sixteenth day of March, in the year of our Lord one thousand nine hundred and twenty.

JAMES S. ALLEN,
Clerk of the District Court of the United States, District of Massachusetts.

Allowed by

JOHN A. AIKEN,
Chief Justice of the Superior Court of Massachusetts.

83 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

And now, here, the Judges of the Superior Court for the Commonwealth of Massachusetts, holden at Boston, within and for said County of Suffolk, make return of this writ by annexing hereto and sending herewith, under the seal of the said Superior Court, a true and attested copy of that part of the record and proceedings in the suit within mentioned, required by the stipulation of the parties with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, Francis A. Campbell, Clerk of said Superior Court, have hereto set my hand and the seal of said court this seventeenth day of March, A. D. 1920.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

[Endorsed:] Writ of Error to State Court. Suffolk Clerk's Office. Filed Mar. 16, 1920. Francis A. Campbell, Clerk Superior Court.

84 *Copy of Petition for Writ of Error.*

85 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 79333.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY

v.

YORK AND WHITNEY COMPANY.

Plaintiff's Petition for Writ of Error.

Now comes The New York Central & Hudson River Railroad Company, plaintiff herein, and says that on the eighteenth day of December, 1919, this court entered a judgment against the Defendant in favor of the Plaintiff, for a part only of the amount claimed by the Plaintiff in its declaration, filed herein, the said judgment having been entered under a rescript from the Supreme Judicial Court, and that in the said judgment and the proceedings had prior thereto, in this case, certain errors were committed to the prejudice of the Plaintiff, all of which will appear more in detail from the assignment of errors, which is filed with this petition.

Wherefor-, the Plaintiff prays for the allowance of a writ of error and such other processes as may cause the same to be corrected by the Supreme Court of the United States.

W. L. PARSONS,
Attorney for the Plaintiff.

Copy.
Attest:

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

86 [Endorsed:] No. 79333. The New York Central & Hudson River Railroad Company v. York & Whitney Company. Plaintiff's Petition for Writ of Error. Filed March 16, 1920. Copy. W. L. Parsons, Attorney at Law, 344 South Station, Boston. G. K. L.

87 *Copy of Plaintiff's Assignment of Errors.*

88 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 79333.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY

v.

YORK AND WHITNEY COMPANY.

Plaintiff's Assignment of Errors.

The New York Central & Hudson River Railroad Company, plaintiff in the above entitled action, in connection with and as a part of its petition for a writ of error, filed herein, makes the following assignment of errors, which it avers were committed in the rendition of judgment and proceedings appearing on the record:

I.

The Massachusetts Supreme Judicial Court in denying to the plaintiff the right to recover on the first item in the account annexed to its declaration, holds that a consignee who receives interstate produce as commission merchant and so notifies the delivering carrier is not liable to pay the full tariff charges unless disclosed to the consignee at the time of delivery. This is in conflict with the Act to Regulate Commerce as amended, as construed by the United States

Supreme Court, providing that no carrier shall charge or col-
89 lect a less or different compensation for interstate transportation than the rates specified in their filed tariffs, and that no carrier shall refund or remit in any manner or by any device any portion of the rates and charges so specified, nor extend to any person any privileges in transportation except as specified in such tariffs.

II.

The decision holds that it is lawful for a carrier to charge and a consignee to pay for the transportation of goods in interstate commerce a rate which is less than the rate prescribed by the duly filed tariffs. This is in conflict with the Elkins Act and the Act to Regulate Commerce, as construed by the United States Supreme Court prohibiting discrimination and the giving or receiving of any rebate, concession or discrimination in respect to the transportation of any property in interstate commerce whereby such property shall be transported at a less rate than that named in the tariffs.

III.

The decision in effect holds that it is lawful to waive the provisions of the interstate bill of lading, issued under the Carmack amendment and constituting a part of the duly filed classification of the carriers, providing that the owner or consignee shall pay the freight and all other lawful charges on the property transported. This is in conflict with the Act to Regulate Commerce, as amended, as construed by the United States Supreme Court.

90 IV.

The decision holds that it is lawful for a consignee accepting an interstate shipment under such a bill of lading to make with the carrier a special agreement with respect to the payment of freight charges, contrary to the provisions of the bill of lading and the duly filed classifications and tariffs. This is in conflict with the Act to Regulate Commerce, as amended, as construed by the United States Supreme Court.

V.

The decision holds in effect that the public is not charged with knowledge of the provisions of the duly filed classifications and tariffs of interstate carriers and that such tariffs and classifications have not the binding force of statute. This is in conflict with the Act to Regulate Commerce, as amended, as construed by the United States Supreme Court.

Wherefore the plaintiff prays that the judgment of the Superior Court, entered as aforesaid under the rescript from the Supreme Judicial Court, in so far as the said judgment denies to the plaintiff

the right to recover on the first item in the account annexed to its declaration, may be reversed and that the said Superior Court may be directed to enter judgment for the plaintiff for the full amount claimed in its declaration, with interest from May 16, 1914, the date of the plaintiff's writ in the said Superior Court.

By Its Attorney, W. L. PARSONS.

Copy.

Attest:

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

91 [Endorsed:] No. 79333. The New York Central & Hudson River Railroad Company v. York & Whitney Company. Plaintiff's Assignment of Errors. Filed Mar. 16, 1920. Copy. W. L. Parsons, Attorney at Law, 344 South Station, Boston. A. S. N.

92 *Original Citation.*

93 Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to York & Whitney Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the City of Washington, District of Columbia, on the twelfth day of April next, pursuant to a Writ of Error filed in the Clerk's Office of the Superior Court of the Commonwealth of Massachusetts wherein The New York Central & Hudson River Railroad Company, a corporation duly established and existing under the laws of said Commonwealth and having a usual place of business in said Boston is plaintiff in error, and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John A. Aiken, Chief Justice of the Superior Court of the Commonwealth of Massachusetts this sixteenth day of March, in the year of our Lord one thousand nine hundred and twenty.

[Seal of the Superior Court.]

JOHN A. AIKEN,
Chief Justice of the Superior Court of the Commonwealth of Massachusetts.

Boston, Mass., March 16, 1920.

I, the undersigned, attorney of record for the defendant in error in the within entitled action, hereby acknowledge due service of the within citation and hereby enter an appearance for said defendant in error in the Supreme Court of the United States.

ADAMS & BLINN.
AMOS L. TAYLOR.
Attorneys for York & Whitney Company.

94 [Endorsed:] No. 70333. The New York Central & Hudson River Railroad Company vs. York & Whitney Company. Citation on Writ of Error. Suffolk Clerk's Office. Filed Mar. 16, 1920. Francis A. Campbell, Clerk Superior Court.

95 *Copy of Bond.*

96 Bond on Writ of Error.

Know all men by these presents, That we, The New York Central Railroad Company, successor to The New York Central & Hudson River Railroad Company, a corporation duly organized by law and having a place of business in Boston, in our County of Suffolk, Commonwealth of Massachusetts, as Principal, and George H. Fernald of Newton, Middlesex County, as Surety, are held and firmly bound unto York & Whitney Company, a corporation duly established by law and having its principal place of business in said Boston, in the full and just sum of Two Hundred and Fifty Dollars to be paid to the said York & Whitney Company its certain Attorney, or Assigns, to which payment well and truly to be made we bind ourselves, our Heirs, Executors and Administrators, jointly and severally, by these Presents.

Sealed with our seals, and dated the Sixteenth day of March in the year of our Lord one thousand nine hundred and twenty.

Whereas lately at a sitting of the Superior Court for the County of Suffolk, on the 18th day of December, 1919, in a suit depending in said Court between The New Central & Hudson River Railroad Company, plaintiff, and said York & Whitney Company, defendant, judgment was rendered against the said defendant on a verdict obtained in the said Superior Court under a rescript from the Supreme Judicial Court, denying to the said plaintiff the right to recover on the first item of the account annexed to its declaration, and the said plaintiff having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse or amend the judgment in the aforesaid suit, and a citation directed to the said York & Whitney Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such, that if the said The New York Central & Hudson River Railroad Company shall

prosecute its said writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

THE NEW YORK CENTRAL RAILROAD COMPANY, [L. S.]
By WILLIAM L. PARSONS, [L. S.]
Attorney.
GEO. H. FERNALD.

Signed, sealed and delivered in presence of
GEO. H. FERNALD, Jr.

Approved:
JOHN A. AIKEN,
Chief Justice of the Superior Court.

Copy.

Attest:
[Seal of the Superior Court.]
FRANCIS A. CAMPBELL,
Clerk of the Superior (Civil) Court.

[Endorsed:] Filed March 16th, 1920. Copy.

Copy of Stipulation as to Record.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 79333.

YORK & WHITNEY COMPANY, Plaintiff in Error,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant in Error.

Stipulation as to Record.

It is hereby stipulated and agreed by and between the parties in view of the fact that both parties have brought petitions for writ of error, that the clerk of said Superior Court may make return under only one of said writs and that such return may be used in both proceedings and that a certified copy of the record now on file in the

Supreme Court of the United States at Washington may be accepted as a part of such return concerning the matters therein set forth, and that the only other matters to be contained in such return under said writ of error shall be the petitions for the writ of error, citations, bonds and assignments of error, and proceedings in said Superior Court thereunder with this stipulation; and further, in view of the fact that both parties have filed an application for writ of certiorari in said action, that such return may be used for the certified copy of the record required to be furnished with such petitions and
99 that if a writ of certiorari should issue, the same may be taken to be the return on such writs and be used in each case.

AMOS L. TAYLOR,
ADAMS & BLINN,
Attorneys for York & Whitney Company.
WILLIAM L. PARSONS,
Attorney for The New York Central & Hudson River Railroad Company.

Copy.

Attest:

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

100 [Endorsed.] Suffolk, ss. Superior Court. No. 7933. York & Whitney Company, Plaintiff in Error, vs. The New York Central & Hudson River Railroad Company, Defendant in Error. Stipulation as to Record. Filed March 16th, 1920. Copy. From the office of Adams & Blinn, 40 Court Street, Boston, Mass.

101 All and singular which premises we have held good by the tenor of these presents to be exemplified, in accordance with the stipulation filed by the parties indicating the portions of the record necessary to the consideration of the question to be reviewed.

In testimony whereof, we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, John A. Aiken, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this seventeenth day of March, in the year of our Lord one thousand nine hundred and twenty.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

102 Supreme Court of the United States, October Term, 1919.

No 803.

YORK & WHITNEY COMPANY, Plaintiff in Error,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

On Petition for Writ of Certiorari to the Superior Court of the State of Massachusetts.

On consideration of the petition for a writ of certiorari herein to the Superior Court of the State of Massachusetts, and of the argument of counsel thereupon had, as well in support of as against the same, it is now here ordered by this Court that the said petition be, and the same is hereby, granted, the transcript of record on the writ of error to stand as a return to the writ of certiorari.

April 26, 1920.

103 [Endorsed:] File No. 27,558. Supreme Court of the United States, October Term, 1919. Term No. 803. Order on Petition for Writ of Certiorari. Filed April 26, 1920.

104 Supreme Court of the United States, October Term, 1920.

Nos. 280 & 281.

No. 280.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plaintiff in Error,

vs.

YORK & WHITNEY COMPANY.

No. 281.

YORK & WHITNEY COMPANY, Plaintiff in Error,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

In Error to the Superior Court of the State of Massachusetts.

It is hereby stipulated and agreed by and between counsel for the parties to the above entitled cases that, inasmuch as the transcripts of records sent up in return to the writs of error sued out by both parties are identical with the exception of the writ of error papers

bringing the cases into this Court, it is unnecessary to print both records, and that the record in No. 280 be printed in its entirety, and pages 1 to 81 of the record in No. 281 be omitted in printing as being identical with those pages in No. 280, and that only the writ of error papers in No. 281 need be printed, the cost of printing to be divided between the parties.

(Signed) W. L. PARSONS,
Counsel for N. Y. C. & H. R. R. R. Co.

(Signed) AMOS L. TAYLOR,
Counsel for York & Whitney Company.

Endorsed: File No. 27,557, etc. Supreme Court U. S. October Term, 1920. Term Nos. 280 & 281. N. Y. C. & H. R. R. R. Co., P. E., vs. York & Whitney Co. York & Whitney Co., P. E., v. N. Y. C. & H. R. R. R. Co. Stipulation as to printing record. Filed Aug. 19, 1920.

Endorsed on cover: File No. 27,558. Massachusetts Superior Court. Term No. 281. York & Whitney Company, plaintiff in error, vs. The New York Central & Hudson River Railroad Company. Filed March 18th, 1920. File No. 27,558.